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ABSTRACT

The 17 articles in this collection deal with theoretical and practical freedom of speech issues. The topics include: freedom of speech in Marquette Park, Illinois; Nazis in Skokie, Illinois; freedom of expression in the Confederate States of America; Robert M. LaFollette's arguments for free speech and the rights of Congress; the United States Supreme Court and the First Amendment; Supreme Court decisions on free press/fair trial conflicts; psychological dimensions of free speech attitudes; the Federal Communications Commission and censorship; philosophical bases of antipornography arguments; the high school press and the First Amendment; a comparison of John Milton's "Areopagitica" with Thomas Erskine's addresses on freedom of speech; the free speech fights of the Industrial Workers of the World; an employee rights scale; a bibliography of materials published from July 1977 to June 1978 that deal with freedom of speech; lists of collections of materials on religious freedom; arguments by 12 advocates of censorship; and disruptions during General William Westmoreland's appearance on a Florida campus to speak in support of the Panama Canal treaties. (FL)

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Free Speech Yearbook

1978

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Editor: Gregg Phifer
The Florida State University

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* * * * * * * * * *

The H. A. Wichelns Memorial Award for the most significant contribution to the Free Speech Yearbook, established in 1974 to honor H. A. Wichelns, a pioneer in the speech communication discipline and an early advocate of the importance of the speech-law aspect of speech communication:

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* * * * * * * * * *

Notice to Contributors

This completes the term of the present editor. Manuscripts for the 1979 Free Speech Yearbook should be sent to the new editor: Dr. Peter E. Kane, State University of New York at Brockport, Brockport, New York, 14420.

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FREE SPEECH IN MARQUETTE PARK:
A REALISTIC LOOK AT THE MARKET PLACE OF IDEAS

Ruth McGaffey
University of Wisconsin-Milwaukee

Several years ago, in a freedom-of-speech class, my students were discussing the United States Supreme Court case of Terminiello v. Chicago. The facts involved an unfrocked priest, advertised as "The Father Coughlin of the South," who had been invited to speak in the city of Chicago under the auspices of Gerald L. K. Smith. Invitations and complimentary tickets were sent out to people thought to support the anti-Jewish ideas of Father Terminiello. At the time of the speech there were from eight hundred to a thousand people inside the auditorium, mostly friendly to the speaker and his views. There were almost an equal number outside the building mostly antagonistic to Terminiello and Smith. Those outside were trying to break down the doors. Windows were broken, a stench bomb was thrown, and several people were injured. In the midst of this, Father Terminiello gave a speech in which he referred to the people outside as "scum."

The question before the class was whether in such a situation a speaker should be permitted to speak even though the likelihood of violence was very high. The class quickly reached an agreement that the speaker should always be allowed to speak and that law-enforcement efforts should be directed against the crowd.

Suddenly one young man blurted out: "Look, you people don't know what you're talking about. I'm a cop, and I've seen situations like this one. Sometimes the only thing you can do is to get the speaker out of there."

The class was silent for a minute, probably because of the shock at finding out that there was a policeman in our midst. Then someone dismissed his comments with a statement to the effect that what he had said was a typical police viewpoint and that this was why they shouldn't be allowed to make such decisions.

My Own Position

I have always agreed with the class's point of view, best expressed by Franklyn Haiman when he suggested that a speaker must be allowed to speak even if the National Guard had to be called out. As justification for this position, Haiman wrote:

> How can such an extreme position be defended? Simply on the grounds that any other course of action is to issue an invitation to hostile audiences to veto the right of dissent whenever they desire to do so. Only by the firmest display of the government's intention to use all the power at its disposal to protect the constitutional rights of dissenters will hecklers be discouraged from taking the law into their own hands. To be sure the temporary costs may seem astronomical, but they may be nothing compared to the costs that could be suffered in the long run through any other course.[1]

I think I still agree with that position. However, the issue is not quite so simple to me now. In 1975 I had never seen a real, live demonstration that involved two opposing forces separated by large numbers of police. Now I have seen such a situation. Furthermore, while I am not proposing a performance course in demonstrations, I am suggesting that those of us who teach, write, and talk about freedom-of-speech issues ought to get out of the classroom

once in a while and see what really happens in the situations we so glibly discuss in our classes. In this essay I will attempt to describe such a situation and then to discover if justification exists for its protection under the First Amendment.

The particular event to be discussed was introduced by a Milwaukee Journal reporter in the following way: "A spectacle that much of the world would be unable to comprehend occurred Sunday in and near Marquette Park on Chicago's West Side. An estimated 1,500 policemen, police helicopters, horse mounted patrolmen and more than 300 police vehicles were used to keep the peace between a local Nazi who is half Jewish and counterdemonstrators in the name of constitutionally guaranteed free speech."2

Most readers are familiar with the background of the July 9, 1978, Nazi demonstration. For at least a year Frank Collin and the National Socialist Party of America had attempted to gain a permit to demonstrate in Skokie, Illinois. This largely Jewish community would have definitely been enemy territory. When it became clear in June and early July of 1978 that the officials of Skokie would not be permitted to stop the proposed demonstration, Collin announced that, having won his battle in the courts, he did not consider it necessary to go to Skokie after all; instead he would hold a rally in Chicago's Marquette Park--which is friendly territory. The rally was held, and the next day's newspapers reported on the event. A headline in the Chicago Tribune read: "Police Arrest 68 as Crowd Upstages Rally by Nazis." The Milwaukee Journal reported: "Police Swarm as Nazis Hold Rally in Chicago." Many reports gave the impression that the arrests were of counterdemonstrators, implying that the audience was largely anti-Nazi. The reports also noted, however, that fifteen hundred anti-Nazi demonstrators had been prevented from reaching the rally.

If my only contact with this situation had been from reading the newspaper reports, my current impression would have been completely different. I would have told my classes that the whole thing had been "much ado about nothing," and my only real question would have been why the anti-Nazi marchers had not been allowed to reach Marquette Park. It is not quite that simple.

To illustrate that point it is necessary to first look at the context in which the demonstration took place. It is not an unfamiliar context to residents of large cities. If one drives toward the south side of Chicago on Interstate 90, gets off on 71st street, and heads west, one will eventually get to Marquette Park. First, however, one must drive through a large, almost black section of the city. The store fronts have metal grills, the streets are full of trash, and the buildings, for the most part, are old and poorly kept up. Slightly before reaching Western Avenue one will note a drastic change. The neighborhood now appears to be completely white. It looks like the kind of blue-collar community found in many large cities. There are single and dual family homes and a few apartment houses. Lawns are neat, streets are clean, and flowers abound. It looks like a pleasant place to live. For many residents, however, there is fear that the situation is changing. David Hamilin described the situation in The Civil Liberties Review:

> Racial tension runs high on the southwest side of Chicago. In and around Marquette Park the tension runs so high that it occasionally explodes. The issue is neighborhood integration--blacks moving away from the core of the city have confronted enclaves of middle and eastern European immigrants. At the borderline between the two forces sits the headquarters of the National Socialist Party of America. Painted on the side of the headquarters is a message: "Niggers Go Home!"
>
> In Marquette Park, Frank Collin stands on the closest thing he will ever find to natural turf. He speaks to an audience whose greatest wish is to hold on to their cultural identity until they can retake their Communist-held homelands. The audience is scared, uncomfortable and deeply threatened.

> It is urban life at its ugliest. Collin's demonstrations have drawn hundreds of angry people, many of whom are young people more than a little ripe for Collin's calls to "drive back the nigger."
>
> Black marches into the area have been met with violence. Rock-throwing has been common; both sides blame the other; and over a period of time, the escalation reached a point where Chicago's officials had to take action. In Chicago, the First Amendment to the United States Constitution is thought by elected officials to be a rumor.[3]

It is not difficult to understand why Collin chose to make his appearance in this community. One Chicago columnist called shouting obscenities, making threats, and voicing religious and racial insults the traditional sport of some area residents[4], so it could be expected that those particular residents would be out in force on July 9.

It also seemed clear that the community residents would not be the only members of the audience. The court battle, its resolution, and the details of the July 9 demonstration had received massive publicity. There were reports that the Jewish Defense League had intended to fly in several hundred young men to do battle if the demonstration had been held in Skokie. No one was sure what it was planning for Marquette Park. The NAACP and several other anti-Nazi groups had said that they would counterdemonstrate. Chicago policemen may have had good reason to expect trouble. They were definitely prepared for it. That was the first thing that became obvious to an observer.

The demonstration was scheduled for two o'clock Sunday afternoon. I arrived in the Marquette Park vicinity about 10:00 A. M. I was accompanied by a young graduate student who is male, six feet tall, and weighs more than two hundred pounds. We were driving a red sports car with Wisconsin plates and were wearing jeans. We were unfamiliar with the area, so we simply drove into the park at the first entrance and began to look for a place to park. It was a lovely Sunday morning. Initially the setting appeared to be similar to that in any park on any Sunday morning. A softball game was in progress. Several people were walking around the lagoon. There was some activity on the tennis courts. It looked as if cars were either randomly parked or simply cruising through the park. The only thing at all unusual was the large number of uniformed patrolmen standing around in groups, especially at the various entrances to the park. They did not stop us, however, and at that point we did not talk to them.

Undercover Policemen

The peaceful scene was deceiving. As we were slowly driving through the park, we heard a horn honk behind us. Assuming that it was someone who wanted to pass, we pulled over. When the car did not pass, we continued on. Again we heard the honking, but the car did not pass. It was an ordinary-looking car, at least five years old, and slightly beat up. It was driven by a tough-looking young man. Three others were with him. When the car failed to pass the second time, we drove on again. Then we heard a siren. We stopped dead. All four young men immediately jumped out of their car and surrounded ours. Another equally beat-up car drove up. Four more men jumped out. They were wearing T-shirts, jeans, and sunglasses. All wore guns. They showed no identification but ordered us out of the car. We were too scared to argue. Neither of us was sure if they were from the Nazis, the Jewish Defense League, or were policemen. They asked to see identification and asked why we were in the park. We told them that we had come to observe the demonstration and asked them where we could park. They searched the interior of the car, the trunk, and my purse, which I had left in the car. Later I thought that I should have objected; but that was much later, when I was safely back in Wisconsin. When they found nothing more objectionable than a couple of clipboards, they told us to get out of the park. One character said that we

could not park anywhere. Another said that if we insisted upon staying, we should go to some side street. They were rude, arrogant, and intimidating. After they left, we drove over to some uniformed policemen who had observed the whole thing. We asked if those other men had been cops. The uniformed patrolmen laughed and said yes. We were not amused.

Fighting the urge to go home, we found a parking space several blocks from the park where we hoped our out-of-state car would appear to belong to someone's visiting relative. We returned to the park and began to walk around. Ten minutes later we saw our friendly under-cover policemen again. This time they were on foot too. They told us to move across a road. We walked across the road and sat on the grass. The reason for the instructions became obvious. Clearly a meeting of undercover policemen was going on. About a hundred old cars were parked on the road. Several hundred men in jeans, T-shirts, with guns, were being given instructions. Eventually they broke up, went to their cars, and drove away--or, at least, began to drive around. We overheard one mention that leaves had been canceled for all white policemen that day.

The under-cover policemen were not alone. Chicago's finest were out in force. At one time we counted more than fifty squad cars parked in a row. Later we noticed a long line of mounted police. Every corner was jammed with patrolmen on foot. Paddy wagons were everywhere. There were many station wagons labeled "City of Chicago Canine Corps." Then two large buses filled with patrolmen in riot gear drove up. By this time no cars except the unmarked police cars were allowed into the park. It was only noon, but people were beginning to gather in the park and along 71st Street. Everywhere could be heard the walkie-talkies of the supposedly under-cover cops. They had put their guns away and now wore red-white-and-blue ribbons on their arms. They looked like the rest of the local people on the street--and that was definitely not friendly. The sight of so much police might was not reassuring. Especially after our earlier experience I was no more reassured by police uniforms than I would have been to see a thousand Nazis in uniform. I began to speculate about what a police state would be like. Would any freedom of speech be possible in that atmosphere?

The police were only one group of participants on the scene. As the crowd began to gather on 71st Street, the expected route of the Nazis to the park, it appeared as if most of the people were local residents. There were some middle-aged and some older people dressed in casual clothes. Some had dogs with them. Some were in couples; a few in groups. Many people were just sitting on their front porches, watching what was happening. There were some young couples with children. A large part of the group, however, was made up of young people ranging in age from fifteen to thirty. Most of these were male. Many wore white T-shirts with a swastika and "White Power" on the front and "Nigger Beware" on the back. Some were carrying wrapped bottles or grocery bags containing beer.

In the next day's Chicago Tribune, columnist Dorothy Collin attempted to make these particular types appear ridiculous. She wrote:

> Back along 71st Street at Western Avenue, two huge men, one in a White Power T-shirt swaggered past a White Castle. Inside they saw a woman. "See that Jew. We ought to cut her throat," said the one in the T-shirt.
>
> Several local boys standing outside with a woman laughed. She told them to be careful. "You don't know who you can trust," she said. "Don't forget, they killed Christ."
>
> The two toughs flexed their muscles at the corner, then went down 71st Street to stand outside a car where they flexed some more. Two sightseers asked them to pose for pictures.
>
> At Rockwell Hall, the Nazi headquarters, the Nazis were posing

in the back parking lot. There were three Nazis and about 30 photographers. Local youths in their "White Power" T-shirts also posed, presenting a panorama of pimples that would make a Clearasil salesman rich.[5]

A couple of boys in T-shirts might be ridiculous. Several hundred people who agreed with them, however, are not ridiculous but frightening. And it was obvious that there were many people present who did agree with them.

I heard one middle-aged man say to a reporter, "What you have to understand is that the Nazis are the only thing keeping the niggers out." Other typical comments were: "Parasites, Hebes, Kikes!" "I never saw so many Hebes before. Everyone should just go right in and get 'em." "Six million more!" Later in the day a black bus driver drove through the area while dozens of people yelled, "Kill him!" At one time a black youth was chased by about one hundred whites. He was thoroughly beaten before the police rescued him. Another "counterprotestor" was chased by some fifty pro-Nazis and escaped only by swimming across a lagoon.

Counterdemonstrators Present

Although local pro-Nazis appeared to be in the majority, they were not the only people there. Many newspaper reports made it sound as if most of the people present were "counterdemonstrators." If this meant anti-Nazis, the report was not true. Out of a total crowd of from two to five thousand there may have been three or four hundred vocal anti-Nazis. Most of these appeared to be Jewish, although there was one group in American Legion uniforms who said they were from Philadelphia. Another quite-obvious and vocal group was "Youth Against the War and Fascism."

The small number of counterdemonstrators at Marquette Park was not due to lack of effort. A group of about fifteen hundred persons, members of the Equal Rights Council, was stopped by police and prevented from marching into the park. This group, which was a coalition of black, Jewish, church, and civil-rights leaders, assembled about a mile east of Marquette Park with the intention of marching west to the park. Apparently they had originally been told that they would be allowed to march, but the police canceled the agreement because of a "volatile situation." At one point more than a hundred helmeted policemen with night sticks in hand stretched across the street, blocking the progress of groups trying to get to the scene.

The final members of the "audience" were reporters and observers. These people stood on the fringes of the crowd and spent most of their time trying to stay out of the way of trouble. I was in this group.

As it got near to 2 P.M., more and more people began to congregate on 71st Street, waiting for the Nazis to appear. They were to be disappointed, however, because the police decided to bring Collin and his men in closed vans to the rally site. All of a sudden someone yelled, "They're already here!" The crowd began moving rapidly toward where the action appeared to be.

The site of the scheduled speech by Frank Collin was on a knoll partly bounded by a lagoon and surrounded by trees. Collin and several of his supporters were standing on the roof of a white van. They had a "White Power" sign and a swastika flag. Several other storm troopers in uniform were standing at each side of the van. Wooden barricades, a steel cable, a row of mounted police, and three lines of uniformed police separated Collin's group from the crowd. Immediately outside this barrier on one side was a group of White Power people. Some were standing, some were sitting on others' shoulders, and many were up in trees (which seemed somewhat appropriate). Most of the time they were yelling, "Jews Go Home," "Kill the Jews!" or less-repeatable slogans. On the other side of the "speaker's stand," also immediately outside of the police barrier, was a smaller group of anti-Nazis. These people were also yelling. I heard "Kill the Nazis!" "Never Again!" and "Don't fight each other, fight the Nazis." These two groups were immediately adjacent to each other. When

they met, fights kept breaking out. Each time they did, the crowds surged back, trampling over kids, bicycles, dogs, and anything in their way. One dog, obviously terrified, kept up a steady stream of yelping. I did not blame him. This was not a football game, and the opposing yells were not those of friendly rivalry. The hatred was so thick you could feel it. I had never seen crowds or even individuals yell such things in public. It was frightening.

In the meantime, while the big show was going on in the audience, Frank Collin was ranting and raving behind the line of policemen. Few could hear him, and almost no one was trying to. Collin was the cause of this demonstration, however, so perhaps a short description of him is in order.

David Hamlin used these words: "Frank Collin is a citizen of the United States. He is also a racist and fascist, a bigoted totalitarian, a self-avowed Nazi. . . He is short, unattractive and his Hitler-style haircut seems as out of place and clownish today as it was in 1939. Nor is Collin a particularly effective public speaker--his written material is crude and there is not the faintest hint of charisma in him or his organization."[6]

Columnist Mike Royko and the FBI have presented evidence that Collin is half Jewish.[7] His father reportedly is a German-born Jew who survived Hitler's Dachau prison camp. The U.S. Justice Department says that Max Collin became a naturalized citizen and legally changed his name from Cohn to Collin in 1946, five months after Frank was born. His mother and maternal grandmother have verified the story. His grandmother said: "Sure his father is Jewish. That's right, he was in a German concentration camp. . . and he [Frank] knows it."[8]

Royko suggested to his readers that the obvious response to a Collin-led demonstration would be to stand on the opposite side of the street and shout, "So's your old man!"

Collin has said that he first became interested in Nazism when he was seven years old and saw a newsreel about Hitler:

> They showed a closeup, he looked so sincere. I had no idea of what he was saying because the Jews who produced the show gave no translation. But I saw how the thousands of people looking at him were so transfixed. I knew what he was saying was important.
>
> Someday the world will know that Hitler was right. The white people in this country will get fed up with our rotting civilization. And we'll have the party and organization they can turn to.
>
> Until I got into national socialism all I wanted to be was a good son, citizen, husband, father and journalist. But once I learned the truth, I had to make sacrifices. I have no life outside the party.
>
> But it's worth it. . . My reward is the respect of millions of Americans.[9]

Collin's organization--the National Socialist Party of America--espouses a platform calling for the forcible deportation of Jews, blacks, Latinos, and other non-whites. The actual members of this group are few. Lately several articles have stated that the whole Nazi movement is small and disorganized. The Anti-Defamation League of B'nai B'rith, credited with keeping a close and relatively objective watch on right-wing groups, especially those which are anti-Semitic, estimated in a recent study that membership in the country's various Nazi parties was from one thousand to twelve hundred.[10] This may well be true. The number who sympathize with the Nazi point of view is probably much larger. I doubt, for example, if many of the residents of the Marquette Park area are members of the National Socialist Party, but support for the Nazi ideas was obvious.

At this demonstration Collin's remarks were almost irrelevant. If one stood in the middle of the crowd, looked directly at him, and concentrated very hard, one could hear a few words and phrases now and then. His vocal tone, pattern, and gestures were reminiscent of World War II newsreels, from which he apparently learned his speaking style. The gist of his remarks was that there would be a 1978 "white power revolution in which the blacks and their collaborators would be wiped off the face of the earth." He said: "Today Marquette Park is a battleground. We would rather see it a battleground than a graveyard of reason. We are going to show the world we are not intimidated by Jews. The 70's belong to the white man in White America."

The speech itself lasted about twenty minutes. During most of that time the only thing that could be heard was "Jews go home!" from one side and "Collin, go to hell!" from the other. There were frequent fights. Usually as soon as one began, the undercover policemen would grab the participants and hustle them quickly to one of the paddy wagons. According to the papers some seventy people were arrested. The undercover cops were efficient and probably prevented much trouble and many injuries. They contributed, however, to the feelings of fear and hate in the crowd.

When the speech was over, the Nazis were quickly ushered into vans and taken back to their headquarters. The crowd milled around with more fights occurring. The White Power boys were looking for fights. One particularly repulsive scene took place on the corner of 71st Street and Sacramento Avenue. While a crowd of several hundred yelled, "Roast 'em like pigs," a group of Jewish youths wearing skullcaps stood at the corner, protected by policemen, who finally took them out of the area in a police wagon. Shortly afterward, the police began to disperse the crowd. The fights and crowds moved east.

Enough was enough for us, so we left. We were too exhausted and, in a way, traumatized to talk about it then. We found it a great relief to listen to a Brewers' baseball game on the car radio. The next morning I heard on the same radio that a body had been fished out of the lagoon in Marquette Park.

There have been many other confrontations between Nazis and "counter-demonstrators" in the past year. In other parts of the country the issues, words, and emotions were very similar. In March, for example, a New York Times headline read, "Hooting Crowd Disperses Nazis Attempting to March in South St. Louis." The thrust of the story was:

> Under heavy protection, the 41 uniformed Nazis, who had gathered here for what they termed a national convention, set forth from the local chapter's new headquarters on Chippewa Street in a rented U-haul truck draped with banners reading "Remember Rockwell" and "White Freedom." They had a city permit to march through the business district of Cherokee Street and on to Gravois Park for a rally.
>
> But despite a bus and two vans loaded with policemen, a motorcycle escort of foot patrolmen along the route, they decided upon seeing the several hundred apparently hostile onlookers gathered along the sidewalks, to remain in their truck.[11]

In this instance the counterdemonstrators were apparently led by members of the Jewish Defense League and the Revolutionary Socialist League. The national director of the JDL was there. She said that her group had brought in "top fighters from around the country, 102 people all together, trained fighters and ready to kill."

Milwaukee Rally

In Milwaukee, according to the Milwaukee Journal, a handful of uniformed Nazis, 150 uniformed police, 600 anti-Nazi demonstrators, and 300 onlookers attended a rally in Humboldt Park on Milwaukee's South side.[12] Although the

demonstration was described as generally nonviolent, there were several arrests, and at least one person was hospitalized. The news report makes no mention of pro-Nazi members of the audience, but it is hard to believe that some were not there. The particular section of Milwaukee in which Humboldt Park is located is not far different from the Marquette Park area of Chicago. Parents of students of mine living on the south side have vocalized about blacks and Jews the same sentiments that I heard in Chicago. It may be that Milwaukee bigots are more quiet and civilized than those in Chicago, or maybe they were really outnumbered and decided to act as observers. Or they may have stayed home.

How is one to analyze situations like these? I have already described the time, place, and manner of the Chicago demonstration. Perhaps the content of the messages communicated should be discussed before the event is evaluated as an exercise of First Amendment rights.

What about Frank Collin? His actual words communicated little to the assembled audience. His presence, however, communicated to the world as well as to his immediate audience the fact that he could bring about a situation of conflict between opposing ideological and cultural groups. He demonstrated that he could force the city of Chicago to provide massive cadres of police and police equipment to protect his rights. He proved that he could split the American Civil Liberties Union. He showed that he could command much media time and space as well as the time and effort of judges and attorneys.

Collin was not the only one communicating. Chicago police showed that they had learned much about crowd control and that they were willing and able to keep order. They educated observers on their methods of crowd control. These included some tough tactics, directed both toward people present and toward those fifteen hundred counterdemonstrators who were prevented from reaching the scene. The presence of the patrolmen, horses, squad cars, and riot gear kept order, increased the drama of the event, probably flattered Collin's ego, and made the marketplace of ideas seem like a hoax.

Most of the crowd demonstrated to the outside world that many people support the anti-Jewish and anti-black ideas of Frank Collin. I do not think most academicians realize this. My academic colleagues and former students have been shocked at the descriptions I have given of the people and the things those people said. They did not really believe, as I did not, that normal-looking Americans went around with "White Power" shirts, yelling "Kill the Jews!"

The counterdemonstrators showed that they not only hated the ideas of the Nazis; they--or, at least, some of them--did not believe that these ideas should be allowed expression. Many of them were willing to be violent to stop that expression.

Given these messages and the situations I have described, is there any overwhelming reason to allow them to continue? What is the justification for allowing Nazis like Frank Collin to demonstrate? Those in favor of repressing these demonstrators argue that in such instances the message is so hateful and the likelihood of violence so high that the balance must be struck in favor of law, order, and tranquillity. Others say that those groups which are antidemocratic in purpose should not be allowed democratic freedoms. That is, those who would destroy the Constitution should not be protected by it. Still others say that in this particular situation survivors of the holocaust may suffer psychic harm by being reminded of their experiences. Finally, it is said that if the purpose of the speaker is to intimidate rather than to persuade or inform, protection cannot be justified.

I find those arguments more persuasive today that I did last spring. What are the counterarguments?

The most commonly used argument is that if Frank Collin is denied his freedom of speech, everyone's freedom of speech is in danger. I have often used this argument myself, but I have always found it overly simplistic. It

stretches a point too far. Surely rational people can make distinctions. It might be possible to guarantee freedom of speech for most Americans without allowing every repulsive creep to tie up the police force of a huge city whenever he wants his ego inflated. History shows us that even when we have been our most irrational we have had considerable freedom of speech. It is foolish to say that without absolute freedom we have no freedom. There must be better arguments than that.

Perhaps we should start by going to the theoretical rationale for freedom of speech. We all know those arguments: Freedom of speech is necessary for self-government, for individual self-realization, for orderly change, and to serve as a safety valve for strong feelings. Can any of these be used?

I doubt if the self-realization of Frank Collin justifies one squad car, let alone three hundred. Nor am I sure that letting off that kind of steam prevents trouble or contributes to orderly change. I do think, however, that it may contribute to our ability to govern ourselves. If it is true that information makes for better decisions, we should have information that tells us what kind of people we are. I think the Marquette Park demonstration serves as a mirror. It shows us that we are a violent, intolerant people and that we really do not believe in freedom of speech--for the other guys. It shows us that Nazis and their supporters wanted to speak in Chicago, but they certainly do not want freedom of speech for Jews and blacks. The counterdemonstrators did not want freedom of speech for the Nazis, and many of them were willing to use violence to prevent it. The police did not appear to want freedom of speech for anyone, although they were forced to maintain it for Collin.

Most Americans Are Intolerant

We do not need to look back to the persecutions of the Mormons or Jehovah's Witnesses or to the Alien and Sedition Acts to realize that this is nothing new. In the 1960s many did not want antiwar demonstrators to speak. The demonstrators themselves, while insisting on their right to burn flags and draft cards, made it impossible for administration speakers to speak on most college campuses. Most Americans are intolerant of others. Plenty of polls have supported that statement.

While most Americans do not burn crosses or beat up blacks or break windows in synogogues, many will become violent if their own little worlds are threatened. We need to know that. Most Americans do not read history, but most watch TV and read newspapers. I am well aware that newsworthiness is what determines what is on the tube and that thus an inaccurate picture of America may be shown. It may also be true that the emphasis on violence on TC has made us blasé toward it. However, I would suggest that more, rather than less, media coverage of rabid groups would be helpful. The frightening proposals of the Ku Klux Klan and the Nazis and a good look at their supporters might convince us that "bad" ideas are held by other than kooks. Similarly groups that normally arouse sympathy and support might turn out in method and means to differ very little from some hate groups. Porno bookstores were fire-bombed in Wisconsin by supposedly Christian-decency supporters. The head of the Jewish Defense League brought a baseball bat to the offices of the American Civil Liberties Union and said that violence would be used to prevent Nazi demonstrations.[13] Violence is violence, and violent good guys are just as bad as violent bad guys.

Such demonstrations not only show us what kind of a people we are; they also show us that we can survive even ourselves. John Jellicorse wrote, a few years ago, that people would get less disturbed about current controversies if they realized that we have always had violence in this country, and somehow the nation has survived. A few heads may bet busted on the way, and the police may riot every now and then; but eventually most everyone gets tired and goes home and tries to live his or her life. The people in Marquette

Park still hate the blacks and Jews, and their hate is probably reciprocated; but life goes on.

It doesn't seem a forceful argument, perhaps, to say that we should have freedom of speech in order that we can realize what a lousy bunch of people we are. Maybe it sounds better to say that we can also realize that we must be a pretty-strong country in order to have survived with so many lousy people. In either case, that is what I am stuck with. I still believe in freedom of speech, but my belief was severely strained--and I shall teach this fall with much more skepticism than I used to. I think that is good. I think I have now a more-realistic view of the marketplace of ideas, and so will my students.

Endnotes

[1]Franklyn Haiman, "The Rhetoric of the Streets: Some Legal and Ethical Considerations," Quarterly Journal of Speech, 53 (1967), 108.

[2]Milwaukee Journal, July 10, 1978.

[3]David M. Hamlin, "Swastikas and Survivors: Inside the Skokie-Nazi Free Speech Case," The Civil Liberties Review, 4 (1978), 10.

[4]Dorothy Collin, "Echoes of an Old Evil in Marquette Park," The Chicago Tribune, July 10, 1978, 1.

[5]Collin.

[6]Hamlin, p. 8.

[7]Hamlin, p. 10.

[8]Milwaukee Journal, July 24, 1977.

[9]Milwaukee Journal, July 24, 1977.

[10]Milwaukee Journal, April 23, 1978.

[11]New York Times, March 12, 1978.

[12]Milwaukee Journal, August 28, 1977.

[13]New York Times, November 9, 1977.

NAZIS IN SKOKIE: ANATOMY OF THE HECKLER'S VETO

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(Prepared as the keynote address for the Speech Communication Association of Pennsylvania convention on October 12, 1978, in Shippensburg, Pennsylvania, and for the National Speech Communication Association convention in Minneapolis, Minnesota, November 2, 1978.)

It was at 2:30 P.M. on Tuesday, June 20, 1978, as I sat in a federal courtroom of the Northern District of Illinois, that I watched the story of the proposed Nazi march in Skokie reach its climax. Television reporters rushed from the chambers to announce to their waiting camera crews that the last act of a drama that had attracted media attention and inflamed human passions for nearly fourteen months was over.

It ended, as it had begun, not as a case involving the Chicago suburb of Skokie, but as one having to do with freedom of assembly in a place called Marquette Park, on Chicago's southwest side. A scholarly black federal-court judge, responding to the arguments of a Jewish American Civil Liberties Union lawyer, had ordered an Irish-dominated city political machine to permit a half-Jewish Nazi to hold a rally in a park surrounded by Lithuanians. That is where self-styled Nazi leader Frank Collin had wanted to be in the first place, and that is where he could now, of his own free will, go instead of to Skokie. In the interim there had been two lawsuits that had worked their way through the Illinois court system, two other suits before federal district and appellate courts, two emergency rulings by the United States Supreme Court, torrents of radio and television coverage, and thousands of pages of print: news and feature stories, editorials, letters to editors, columns, and cartoons.

In that same period my own psyche was battered by a host of personal experiences I shall not soon forget: the sharp words exchanged with Harvey Schwartz, Skokie's attorney, on a Mutual Broadcasting System radio debate; the public disagreement in the Chicago media with my favorite U. S. Congressman: Abner J. Mikva, whose Academic Advisory Committee I chair; the survivor of Auschwitz in a local B'nai Brith audience who came out of his chair screaming "Filthy scum!" at me as he was restrained by his friends; the question-and-answer session in a Columbia Broadcasting System television studio with a live audience consisting entirely of holocaust survivors; Rabbi Rudolph Rosenthal suddenly sweeping his hand at my face, stopping an inch or two short of it, to make his point to a Cleveland City Club audience that some kinds of symbolic conduct (such as threatening gestures) do not merit First Amendment protection; the security guards walking me back to my car after a speech (at Northeastern Illinois University) which had stirred denunciations from members of the Spartacus League in the crowd.

But I am not here to solicit your sympathy or emotional support, for happily there has been an ample supply of that in these difficult months. For example, how can one be discouraged when he heard the ninety-four-year-old Roger Baldwin, founder of the ACLU, proclaim (last June) in his still-booming orator's voice: "My survival is a matter of luck, but the ACLU's survival is a matter of integrity"?

Having thus biased the case that I wish to present to you (as if you did not already know my First Amendment prejudices), let me proceed to the story of the Nazis in Skokie--a case study of the heckler's veto.

The Beginning of the Drama

As I have already indicated, the drama began, not in Skokie, but in Chicago's Marquette Park, a short distance from the headquarters of the so-called National Socialist Party of America (not to be confused with the National Socialist White People's Party, based in Cicero, Illinois, which claims to be the true descendant of George Lincoln Rockwell and which kicked Collin out of its party a few years earlier, presumably because of his allegedly Jewish father). And it all began, not a year and a half ago, but in 1970, when Collin first walked into our ACLU office in Chicago to complain that his First Amendment rights were being abridged by the refusal of the Chicago officials to give him a permit to speak in Marquette Park. That complaint led, through a series of legal actions, to a decision by the United States Seventh Circuit Court of Appeals in Collin v. Chicago Park District in 1977, finding Chicago officials in violation of the Constitution and ordering them to allow Collin to speak and hold his rallies.

Speak and rally he did, from 1972 to 1976, with only sporadic incidents of ensuing violence, for which the guilty parties--and sometimes innocent ones as well--were quickly arrested by Chicago's men in blue. But as the black ghetto spread closer and closer to the low-income white ethnic neighborhoods surrounding Marquette Park, tensions rose in the area, and the police became understandably more nervous. So, in May, 1976, Chicago Park District officials came up with a new technique for putting Collin (as well as a lot of other would-be exercisers of free speech) out of business. This was a requirement that any assembly of more than seventy-five persons (counting onlookers, it should be noted) could not obtain a permit without posting from $100,000 to $300,000 worth of liability insurance--a kind of insurance that, even if the premiums were not prohibitive, is simply not available to high-risk groups like neo-Nazis or to their bitter foes in the Marquette Park vicinity: the Martin Luther King Jr. movement.

The Question of Liability Insurance

So Collin came back to the ACLU, we went back to the federal court, a district-court judge upheld the insurance requirement, and the Court of Appeals sent the case back to the lower court for further consideration. All this took time, of course. Meanwhile the publicity-hungry Collin sought action elsewhere. In early 1977 he wrote a letter to at least a dozen Chicago suburbs (my home town of Evanston among them) announcing his intent to grace them with his unwelcome presence. Most of them ignored his letter, but not the village of Skokie. (With a population of seventy thousand) Skokie advertises itself as the "largest village in the world.") Village officials informed Collin that their parks, too, required liability insurance.

This was a red flag to Collin, who at that point may not even have been aware of the heavily Jewish population of Skokie with its concentration of holocaust survivors and their families. But no sooner had he announced his intent to march on a public sidewalk in front of the Skokie Village Hall to protest the liability-insurance requirement of the parks, he quickly discovered, thanks to the community's reaction, what a publicity gold mine he had struck. It was at that moment, also, that the case of the Nazis in Skokie was on it way to becoming one of the biggest media events of the 1977-78 season.

A Series of Legal Actions

Legal actions followed quickly. To condense a great deal into a few minutes let me highlight these events:

The Village of Skokie obtained a county-court injunction to prevent the Nazis' announced demonstration at the Village Hall on Sunday, May 1, 1977. So Collin decided to go there on Saturday, April 30, the day before. As an ACLU observer I was waiting on the steps of the Village Hall that afternoon--

waiting along with a large and angry crowd, some equipped with boards and baseball bats. But the Nazis never arrived. I learned from a reporter with a walkie-talkie that their two vans had been stopped and turned back at the near-by expressway exit ramp.

I went immediately to a public telephone to report what had happened to David Goldberger, the ACLU attorney handling the case. He could only speculate that another injunction had been obtained, this time ex parte, since he had received no notice. That, in fact, is exactly what had happened. At ten o'clock that morning a county-court judge had been found at home and signed an ex parte injunction prohibiting the assembly on April 30 or any other time "until further order of this court."

The following week Goldberger asked the Illinois Appellate Court for an immediate review of the injunction. It declined, as did the Illinois Supreme Court. This resulted, on June 15, in an order from the United States Supreme Court (in National Socialist Party of America v. Skokie) directing the Illinois courts either to grant prompt review of this prior restraint on speech or to issue a stay of the injunction. Reasonbaly prompt review was then granted by the Illinois Appellate Court, which narrowed the scope of the injunction to prevent only the public display of swastikas. In January, 1978, the Supreme Court of Illinois struck down the injunction in its entirety.

At the same time the Illinois high court ordered dismissal of a second lawsuit that had been wending its way through the state courts. Anti-Defamation League attorneys, dissatisfied with Skokie's legal tactics, had filed an action of their own on behalf of a group of holocaust survivors residing in the community, seeking to enjoin the Nazi march on the grounds that it would constitute a psychic assault on the plaintiffs. This unprecedented attempt to invoke a principle of tort law known as "the intentional infliction of emotional distress" as a basis for a prior restraint on a political assembly was dismissed out of hand by the State Supreme Court. The ADL's legal strategy had fared no better than that of Skokie.

New Skokie Ordinances Adopted and Opposed

Skokie officials had themselves foreseen the fate that their injunction might meet in court, so they gathered in an emergency session on Monday, May 2, 1977. They quickly adopted three new municipal ordinances, all admittedly designed to block any Nazi demonstration. The first extended the liability-insurance requirements from the parks to the streets and all other public areas. The second banned public demonstration by members of any political party wearing military-style uniforms. The third prohibited the dissemination or display anywhere in the village of Skokie of materials or symbols promoting or inciting hatred against people for reason of their race, national origin, or religion--a so-called group-libel law.

The ACLU challenged the constitutionality of these ordinances in federal court. On February 23, 1978, District Court Judge Bernard Decker found them all to be in violation of the First Amendment. However, because he felt that his opinion on the group-libel law was arguably inconsistent with a twenty-six-year-old U. S. Supreme Court precedent on that subject (Beauhernais v. Illinois), he granted a forty-five-day stay of his own order to give the U. S. Circuit Court of Appeals an opportunity to review his decision before a permit to march was issued.

The U. S. Seventh Circuit Court of Appeals responded swiftly. Oral argument was set for April 18 before a three-judge panel of the court. On Monday, May 22, the court handed down a ruling affirming Judge Decker's finding that the ordinances were unconstitutional. Later that week Skokie officials announced that they would seek review of this decision by the U. S. Supreme Court and would ask Justice John Paul Stevens for an emergency stay of the ruling, pending review. But meanwhile they were legally bound to issue the permit Collin had requested for a thirty-minute march in front

of the Village Hall on Sunday, June 25. They did so promptly.

Headed Toward a Clash

At that point the attention of the nation's media became riveted on the Skokie story on an almost daily basis as events rushed headlong to their climax. Leaders of a federation of Jewish organizations announced plans for a massive counterdemonstration in Skokie on the date of the march. This would involve an expected fifty thousand people, including Illinois Governor James Thompson and U. S. Congressman Abner Mikva. Rabbi Meir Kahame, founder of the Jewish Defense League, promised that blood would flow in the streets. Collin, allegedly facing internal problems from members of his group who were quoted by one reporter as being "more interested in fighting the niggers than the Jews," told the press that he would call off the Skokie march if three conditions were met: First, the permit Collin now had in his possession for a June 25 march in Skokie must not be invalidated by further legal proceedings. Secondly, two new laws pending in the Illinois state legislature, designed to block the Nazi march, must fail of passage. Thirdly, Collin's right to assemble followers and to speak in Marquette Park must be fully restored.

Within three weeks Collin had everything he asked for. Perhaps this was because of the pressure generated by the bait of his calling off the march (a view I'm sure he holds); perhaps in spite of his threats and promises (an entirely plausible alternative explanation); or perhaps as a result of a combination of these contradictory forces (a hypothesis I believe to be closest to the truth).

Three Conditions Met

The first condition was met on June 12, when the full U. S. Supreme Court, responding to Justice Stevens's referral of the matter to the Court, refused by a 7-2 vote (Justices Harry Blackmun and William Rehnquist dissenting) to grant a stay of the Court of Appeals ruling against the Skokie ordinances. So the march could go forward even if the Supreme Court should later decide to review the case and determine for itself whether Beauharnais v. Illinois was still to be taken seriously.

The second condition was met the next day, when the Illinois house of representatives overwhelmingly killed the two pieces of legislation that, a month earlier, had been even more decisively rushed to passage in the state senate. One of these proposed statutes would have re-enacted the Illinois group-libel law, which had been upheld in Beauharnais but was later repealed by the Illinois legislature. The other, whose meaning no one, including its sponsor, could explain, would have outlawed demonstrations by groups that "arouse reasonable apprehensions that they were organized for the purpose of using or displaying physical force in promoting any political object." Under this law the use of "symbols having historic associations with political violence" or the use of "quasi-military uniforms" would be evidence of a violence-prone group.

The third and final condition was met one week later, when Federal District Court Judge George Leighton ordered the Chicago Park District to issue instantly and without the requirement of liability insurance a permit Collin had requested for a July 9 rally in Marquette Park. Actually Judge Leighton had issued an injunction nearly a year earlier against enforcement of the $300,000-liability-insurance requirement; but Park District officials, relying on the letter rather than the spirit of that order, had merely reduced the amount of insurance required to $60,000, knowing full well that no insurance of any kind was available to Collin.

After months of futile negotiations with the Park District, Attorney Goldberger had gone to Judge Leighton on May 27, 1978, asking that the Park District be held in contempt of his 1977 ruling. The June 29 hearing in Judge Leighton's courtroom was scheduled in response to that motion. Although

the judge agreed with Park District officials that they were not technically in violation of the language of his order, he was sufficiently convinced of their foot dragging that he accepted a second motion by Goldberger to modify his injunction on the spot, and he ordered the issuance, instantum, of a Marquette Park permit for July 9.

The Outcome

What followed was anticlimax. On Thursday evening Collin predictably called off the Sunday march in Skokie, the leaders of the counterdemonstrators canceled their plans, the Governor withdrew his instructions to the National Guard, and the residents of the village of Skokie slept peacefully that weekend.

The problem posed, however, by continuing Nazi demonstrations in the city of Chicago and by racist activity elsewhere in the United States was by no means resolved by Skokie's return to suburban tranquillity. And when one examines the lines of argument against the Skokie march, repeated in legal briefs, letters to the editor, sermons from temple pulpits, and in endless face-to-face encounters, one becomes acutely aware of how fragile is our society's commitment to First Amendment values.

Arguments by Opponents of the March

The argument took many forms, but at the core of all of them was a rejection of the principle, so well expressed by Justice Louis Brandeis in Whitney v. California in 1927, that "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Rather, the opponents of the march in Skokie adopted the philosophy that certain kinds of expression, like the advocacy of genocide or the display of Nazi symbols, are so palpably evil and so devastatingly traumatic for those who see and hear such communication that the power of government is justifiably invoked to guard them from exposure to it. It may appear to demean the worthiness of their motives and to show disrespect for the depth of their feelings for me to characterize their position as a classic case of the heckler's veto, but I cannot in all honesty do otherwise. Let us look at the arguments, one by one, to see how they fit that model:

The first and commonest theme was that a Nazi march in Skokie would be like shouting "Fire" in a crowded theater--a clear and present danger outside the protections of the First Amendment. Aside from the consistent misquoting of Judge Oliver Wendell Holmes's famous admonition against falsely crying "Fire" in a crowded theater, the proponents of this argument failed to see the distinction between a panic-struck captive audience in an enclosed arena and a crowd warned a month in advance of what they would see if they came, of their own free will, to a public sidewalk in front of a village hall on a particular Sunday afternoon. Any clear and present danger that might occur under such circumstances would result only from violent attempts to exercise a heckler's veto against the Nazi demonstration.

But, it was then asked, is not the proposed march in Skokie a deliberate attempt to provoke such violence, an incitement to riot not protected by the First Amendment? Again the argument failed to perceive a crucial distinction. A speaker may be guilty, under the Supreme Court's ruling in Brandenburg v. Ohio in 1969, of direct incitement to lawless action where there is a likelihood that such action may immediately occur, but only where the speaker is advocating that action. Collin was not going to Skokie to urge his own mutilation. If violence were to have broken out there, those in the audience who instigated the lawlessness would have been responsible for incitement to riot, not Collin. To shift the blame for the violence in which a hostile audience engages to the target of their lawlessness, using the rationale that the target's ideas or presence are the real "cause" of all the trouble, is one of the subtlest forms of heckler's veto; for

it stands logic on its head without appearing to do so.

Closely akin to the incitement-to-riot argument was the allegation, accepted by the Illinois intermediate court, that the display of Nazi symbols in Skokie would be akin to "fighting words"--another category of expression that the U. S. Supreme Court had placed outside the protections of the First Amendment. One could counter this charge, as Attorney Goldberger did, simply by noting that the fighting-words doctrine allows for punishment only after the fact, nor for prior restraints, and that it does so exclusively with respect to face-to-face encounters in which one individual hurls personal insults at another individual, not in which a speaker is addressing a rally or communicating a political message to a crowd of observers.

But I would go further and suggest that the fighting-words doctrine, even thus narrowly construed, is another kind of heckler's veto--a First Amendment aberration that ought to be abandoned by the Supreme Court. The Court's own definition of fighting words is enough to discredit the doctrine among people who understand that meaning in the eye of the beholder. Said the U. S. Supreme Court in Chaplinsky v. New Hampshire in 1942 in explanation of the doctrine: "The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile . . . such words, as ordinary men know, are likely to cause a fight." And with a disarming smile, I suppose, no one would be likely to fight?

Another argument against the Nazi march in Skokie, although not taken seriously by any court or lawyer, was ardently embraced by the otherwise-intelligent columnist Gary Wills, who proposed that the Nazis should be barred from the streets as an obscentity or a public nuisance. Even more than with the fighting-words doctrine, it takes a considerable stretch of the imagination to bring the display of political, even genocidal, symbols within the definition of obscenity (that which appeals to the prurient interest in sec) or of public-nuisance law (that which allows you to complain about your neighbor's stereo at three in the morning). But, assuming that that feat could be accomplished, we again would have a classic case of the heckler's veto--ideas and symbols suppressed because they are beyond the pale of acceptability to the mores of the majority.

By far the most formidable opposition to the Nazi march came from those who held that racist communication is of utterly no value in the marketplace of ideas, that it has been outlawed by the civilized democracies of Western Europe, and that we in the United States should follow suit either by adopting criminal group-libel laws or by allowing civil suits for the prevention and punishment of speech that inflicts emotional distress upon others. As well-intentioned and as authoritatively supported as this position may be, I can find nothing to distinguish it from other forms of the heckler's veto. If adopted and enforced even-handedly it would have to encompass the burning of all copies of Hitler's Mein Kampf, Shakespeare's The Merchant of Venice, Huckleberry Finn, and Little Black Sambo. The National Broadcasting Company's "Holocaust" series would have been taken off the air because of the complaints made by German-Americans in Chicago that it was stirring up hatred against them and that their children were being called "Nazis" by other children at school. Blacks would not be allowed to say that some people are "honkie bigots" and the counterdemonstrators at a Collin rally in downtown Chicago on June 24, 1978, would have been arrested and punished for shouting "Kill the Nazis" and "Death to the Nazis." In short, the measure of freedom of speech would be in the degree in which it stirred up intense feelings in one's adversaries.

Many have bemoaned--and I have been among them--the world-wide attention Frank Collin gained from that simple letter he wrote to the village of Skokie nearly two years ago. But, perhaps unwittingly, he and Skokie have done us all a favor. Perhaps the nation's re-examination of the meaning of the First Amendment, triggered by their actions, will leave us all with a better understanding of why it is that a society confident of its own values will defend the right of free expression even for those whose beliefs and messages it most despises.

FREEDOM OF EXPRESSION IN THE CONFEDERATE STATES OF AMERICA

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During the formative years of the Republic the South provided some of the abler advocates of freedom of speech and press. Virginia became the first state to include protection for freedom of the press in its constitution in 1776. Thomas Jefferson wrote the Virginia Statute of Religious Freedom in 1785. Charles C. Pinckney, of South Carolina, tried to insert a clause protecting freedom of speech in the original draft of the Constitution in 1787. North Carolina demanded a Bill of Rights protecting the freedom of speech and press during its ratification debates on the Constitution in 1788. James Madison authored the First Amendment in 1789. Ten years later he and Jefferson took the lead with the Virginia and Kentucky resolutions against the federal sedition act.

This early libertarian heritage, however, faded with the growth of abolition sentiment during the first decades of the nineteenth century. Clement Eaton, one of the leading authorities on the antebellum South, dates the major turning point at 1830, when state legislatures first responded to "incendiary" tracts advocating slave rebellions. The fear of servile insurrection had always been present among the slaveholding class, and these publications from the North led to "a drastic regulation of freedom of speech and of the press."[1] This legislation and subsequent acts aimed at related issues are believed to have been responsible for "the loss of freedom of thought and speech after 1835."[2]

Leonard W. Levy has examined the legal and philosophical development of the concept of freedom of expression during the colonial and early national period.[3] Clement Eaton has written of the southern experience leading up to the Civil War.[4] Harry Kalven, Jr., has discussed important developments during the "Second Reconstruction" of the 1950s and 1960s.[5] Other scholars have concentrated on the constitutional controversies that have developed in the period since 1917.[6] Only scant attention, however, seems to have been given to the concept of freedom of expression during the Civil War. This article focuses upon the concept and practice of freedom of speech and press in the Confederate States of America, 1861-1865. While filling an important void in the scholarly studies tracing the development of First Amendment theory, such an examination should also provide comparative insights to the only other government of English heritage to exist within the present boundaries of the United States.

Constitutions and Courts of the Confederacy

While presidential and congressional Reconstruction plans differed as to whether or not the eleven southern states had actually withdrawn from the Union, the elected representatives of those states certainly presumed the right and action of secession. On February 4, 1861, delegates from South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana, soon to be joined by delegates from Texas, met in Montgomery, Alabama, to form a new national government. The product of their deliberations, the "Confederate States of America, claiming and exercising empire from the Atlantic to the Colorado and from the Gulf to the Ohio, was a federal republic, organized in all branches of government."[7]

The first procedural actions of the Montgomery convention did not encourage those who might have expected or hoped for an open government. In a letter to his wife on February 5 one delegate wrote: ". . .we cleared the

galleries this morning and went into secret session. The outsiders were very much outraged at the movement . . ."[8] He further explained that the delegates, like the framers of the United States Constitution, were "doing the most important work in 'secret session' and a member is expelled for divulging the matter in any manner."[9] The press, upset, voiced its displeasure by charging the convention with conspiracy and deceit. But one member responded that to assure calm, unbiased deliberations "it was of the highest importance that our actions not be anticipated and misrepresented through the appliances of news mongers and sensational telegrams."[10]

On February 5, 1861, the second day of the convention, Memminger of South Carolina proposed "that a committee be appointed to report a plan of the provisional government . . . upon the basis of the Constitution of the United States."[11] Such an action might seem somewhat inconsistent for recently seceded states; but, as another delegate later explained, they had withdrawn "not from the Constitution, but from the wicked and injurious perversions of the Compact."[12] The committee presented a draft on the afternoon of February 7. It was debated in secret session and adopted on the evening of February 8.[13]

Article I, Section 7.9 of the Constitution for the Provisional Government of the Confederate States of America stated: "Congress shall make no law respecting a establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble and to petition the Government for a redress of such grievances as the delegated powers of this Government may warrant it to consider and redress."[14]

This paragraph differs from the First Amendment to the Constitution of the United States only with respect to its qualification concerning the types of grievances mentioned. Rather than an authorization to limit freedom of assembly this change reflected two significant currents in southern thought of the period: (1) a states'-rights view of limited national government and (2) a response to abolition petitions that had been received by the United States Congress in previous decades.

The permanent Constitution of the Confederate States of America, which was presented on February 28, adopted on March 11, and ratified on March 29, 1861, did not include the additional language. Article I, Section 9.12, in phrasing identical to the First Amendment to the United States Constitution, declared: "Congress shall make no law respecting an establishment of religion, of prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble and to petition the Government for a redress of grievances."[15]

The debates on this paragraph reveal that on March 6 two attempts were made to modify its scope, but neither would have changed the protection of speech and press. Delegate Cobb tried to insert a clause prohibiting Congress from requiring any citizen to perform secular labor on Sunday,[16] and Delegate Wither moved to again add the restriction "such as the delegated powers herein contained may authorize Congress to redress."[17] Both motions were defeated.

In view of the prevailing states'-rights philosophy and the growing regional resentment against decisions of the United States Supreme Court during the years preceding secession it is also necessary to examine the Confederate judicial system. Article III of the Provisional Constitution provided for a system of district courts, each state constituting a judicial district, and a Supreme Court consisting of a majority of the district judges sitting together.[18] In the permanent Constitution, after realizing the difficulty of assembling judges from distant districts, the delegates authorized Congress to establish an independent Supreme Court to hear appeals. Although legislation was offered in every session of Congress, no Supreme Court was ever established. Some members opposed a Supreme Court's having appellate jurisdiction over state courts. Some feared centralizing of national power should President Jefferson Davis appoint former United States Supreme Court Justice John Archibald Campbell of Alabama.[20] Some were afraid that Davis would appoint former U.S. Senator

Judah P. Benjamin, his most influential secretary. Others were more concerned about such matters as the conduct of the war. One member said: "We had no time for Courts. We had no use for Beat Courts, nor for County Courts, nor for the State Courts, nor for Confederate Courts."[21]

The Confederate district judges were appointed by Davis and confirmed by Congress in May, 1861. Most of the former U.S. district judges resigned their positions, took an oath to support the Confederate Constitution, and were reappointed as Confederate district judges.[22] The transition from one federal judiciary was so smooth that some of the clerks "merely turned a page in the United States record books and went on with the business of the day."[23] The judges of the state supreme courts made even more effortless adaptations to the new order than did the federal judges. They merely took an oath to uphold the new Constitution and remained in office to rule upon the continuing dockets and state laws.

Both federal and state courts continued to cite the decisions of the U.S. Supreme Court almost as if the states had not seceded. One state court cited The Federalist in support of the Confederate government's power of military conscription.[24] Another relied on Mr. Justice Marshall's decision in McCulloch to grant the Confederate government power in a conflict of jurisdiction with a state.[25] In the words of one scholar, "So far as the character of the decisions was concerned, it would be difficult as a rule for a reader of the Southern judicial literature to discover that there had been a withdrawal from the Union."[26]

With regard to district-court decisions, however, that literature is rather limited. Sidney D. Brummer, an early Confederate legal historian, was unable to locate any Confederate district-court opinions in either manuscript or print.[27] Another writer seemed to infer from this that the district courts had an insignificant role.[28]

Although they may have been overshadowed in importance by the state supreme courts,[29] there were other reasons for the lack of published reports. The reports of only one federal district court had been published in the antebellum South,[30] and the war period was not the most opportune time to begin such a practice. The excitement and confusion of war did little to encourage the keeping of better records, for as early as August, 1862, thirteen of the forty-three regular district-court seats had been abandoned because of hostile military activity.[31] Some reports did survive in the form of newspaper accounts and pamphlets. These give some idea of the character of judicial opinions.

Neither the extant federal decisions nor the numerous reported state-court opinions, however, reveal very much regarding the meaning of freedom of speech and press. In only about half the states did constitutional issues arise. These dealt with the national government's power of military conscription, which the state courts upheld, and the power to suspend the privilege of the writ of habeas corpus, on which no state supreme court ruled.[32] Restrictions on freedom of speech and press were not challenged on the basis of Article I, Section 9.12, just as the First Amendment was not invoked in the United States during that time. One must turn elsewhere, then, for a better understanding of the concept and practice of freedom of expression. It would seem profitable to examine the legislative enactments, executive decisions, military activities, and extralegal restraints.

Legislative Acts and Attitudes

Congressman Cocock, Speaker of the Confederate House of Representatives, once quipped that the Richmond Examiner should be destroyed and its editor hanged.[33] Congressman Leach also made the same hyperbolic suggestion with regard to the treatment of editors in general.[34] Congressman Conrad also resented the press and said that he saw no need to exempt editors from the conscription law, that newspapers in the Confederacy had done more harm than good, and that the South could probably do just as well without newspapers for six months.[35] Despite these comments indicating congressional disdain, when pro-

posals were presented to curb the press or establish penalties for publishing military information, Congress refused to take such action.[36]

On two occasions, however, the members were angered enough to suggest action against those who attacked their deliberations. An article written by George C. Stedman in the Richmond Enquirer on February 24, 1863, drew the ire of the Senate. Stedman had accused Senator Albert Gallatin Brown of Mississippi, an opponent of exampting newspaper editors from conscription, of having done some rhetorical grand-standing in a bid for popularity. The Senate viewed the remarks as "an attack upon the personal and political character of a Senator, couched in indecent and offensive language."[37] On February 25 the Senate passed Senator Wigfall's resolution establishing a committee "to inquire into the rights and duties of reporters admitted to seats upon the floor of the Senate, and also to inquire as to whether there had been any breach of those duties in certain comments made by a reporter in the columns of a newspaper published in this city . . ."[38] The committee report, issued on March 11, concluded that admission to the floor of the Senate was a privilege that could be withdrawn for either inaccurate or insulting reporting without violating the rights of the press.[39] Following the report the Senate adopted a resolution withdrawing privileges from Stedman, but it rejected two other proposals that would have withdrawn the privilege of the floor from the Richmond Enquirer and given the presiding officer the power to withdraw the privilege from any reporter or newspaper at his discretion.[40]

The Senate's action in this incident suggests that the Confederate senators had progressed beyond the concept of seditious libel but had not yet reached the conclusions of the present generation regarding the right to cover and report governmental proceedings under the First Amendment and freedom-of-information legislation. Two years later, though, the House went even further than the Senate. On January 14, 1865, the Richmond Sentinel ran an article charging the Congress with treasonable activity for attempting to secure a negotiated peace. Two days later Congressman Lester moved to suspend the rules and allow his introduction of a resolution denouncing the newspaper. He was supported by several members who took exception to the insulting language in the article. Congressman Smith of Alabama even threatened to resign in protest. But the House, by a vote of 32-36, refused to allow Lester to even introduce the measure.[41]

The Congress did pass several pieces of legislation which affected the rights of citizens to engage in communication: an act against enticing desertion from the military forces[42] and another to prevent improper communication with the enemy.[43] Under the second of these any person "corresponding with the enemy in any manner with intent to injure the Confederate States of America . . ." could suffer death or up to twenty years in prison. Later, following futile attempts to secure convictions for treason, Congress enacted another bill "to define and punish conspiracy against the Confederate States," which made punishable by five years' imprisonment any conspiracy "to hold any secret Communication with the enemy" or to "promote disobedience of military orders, or desertion."[44]

On the other hand, newspaper operations were aided by special postage rates for newspapers, magazines, books, circulars, and other printed materials, and by free postage on newspapers mailed between publishers. Congress even enacted, over Davis's veto, legislation extending the frank to newspapers mailed to soldiers.[45] Further protection was given the press by exemption from conscription of "one editor of each newspaper now being published, and such employees as the editor or proprietor may certify, upon oath, to be indispensable for conducting the publication."[46]

Another important medium of communication--the telegraph--was placed under the control of the President as early as May 11, 1861. The Postmaster General was designated to take charge of the lines and supervise communications passing through "to the end that no communications shall be conveyed of the military operations of the government to endanger the success of such operations, nor any communication calculated to injure the cause of the

Confederate States . . ."[47] Such language, considered overbroad by today's standards, reflected the war-time atmosphere. The statute went even further by limiting the transmission of communication "calculated to affect the public welfare" and allowing the military censor to strike "whatever he thought improper."[48]

As in the foregoing examples congressional attitudes toward freedom of expression were usually developed against the background of some military activity. In September, 1863, Senator Haynes of Tennessee offered a resolution that has received differing assessments by historians, some viewing it as an attempt to protect freedom of speech and others describing it as a sedition bill aimed at curtailing it.[49] The legislative history of the resolution and the subsequent bill suggests that the latter view is the more correct. The Haynes resolution asked the Judiciary Committee to "inquire into the expediency of providing by law, under proper sanctions, that no military commander . . . shall suspend or abridge the freedom of speech or of the press, and fixing suitable penalties for the abuse of such freedom when exercised to disturb the public peace, or incite to domestic violence or rebellion against the Confederate States."[50] The Senate amended the resolution to delete any reference to the abuse of freedom of speech before passing it,[51] and prevented the enactment of a companion bill aimed at punishing insurrection and rebellion when Senator Wigfall read a section of the Sedition Act of 1789 for "odious comparison."[52]

The pressures of war and military necessity did, however, combine to force Congress to pass three acts that had a profound effect upon the exercise of individual rights--acts that would never have been passed in peace time. Twice in 1862 and once in 1864 Congress enacted legislation authorizing the President to suspend the writ of habeas corpus for a combined period of sixteen months.[53]

The first act declared that during the invasion of the Confederate States, "the President shall have the power to suspend the privilege of the writ of habeas corpus in such cities, towns, and military districts as shall, in his judgement, be in such danger of attack by the enemy to require the declaration of martial law for their defense."[54] During the first two weeks of suspension Richmond Provost Martial John Winder's troops made more than thirty arbitrary arrests, leading one resident to describe the period as a "reign of terror."[55] One citizen arrested by military authorities charged that the legislation had been enacted "for the purpose of putting a padlock upon every man's mouth, and thus annihilating all freedom of speech . . ."[56] This vigorous exercise of power led Congress to amend the law within two months, setting a date for the termination of the authority and limiting its application to "arrests made by authority of the Confederate government or offenses against the same."[57] When the law was renewed for a second time, Congress retained the above restrictions, eliminated the reference to martial law, and required the President to order the investigation of the cases of all persons arrested under the act.[58]

In February, 1864, President Davis again asked for legislation allowing suspension of the writ, citing acts of treason and plots to incite slave rebellions as reasons necessitating the power.[59] The law was enacted a third time, but both public and congressional opposition was growing. The legislatures of Georgia, North Carolina, and Mississippi passed resolutions declaring the law to be unconstitutional,[60] and the North Carolina Assembly went so far as to impose a fine and imprisonment for anyone failing to honor a writ of habeas corpus.[61] In general "prevailing opinion in the South held the suspension law unconstitutional and the practice dangerous."[62] Congress considered repeal of the legislation, but the threat of a veto prevented that action.[63] In May and again in November, Davis requested that the authorization be renewed; however, both times Congress refused to grant the request.[64]

The controversy surrounding the executive suspension of the privilege the writ of habeas corpus and the accompanying military actions under martial law were among the more-emotional issues considered by the Confederate Congress.

Under the suspension of the writ some of the most-oppressive actions concerning freedom of expression were taken. These led to grave congressional concern. An examination of the attitudes and activities of the executive branch, especially those of the War Department, is necessary for a full understanding of the reasons for and the reactions to these restrictions on freedom of speech and press.

Executive Department Actions

Although President Davis had requested authority to suspend the writ of habeas corpus during periods of military crisis, he was otherwise tolerant of citizens exercising their freedom of speech and press. A survey of southern newspaper editorials of the war era revealed that Davis was "far from popular among members of the fourth estate."[65] One contemporary writer observed in May, 1863, "I find that it is a great mistake to suppose that the Press is gagged in the South, as I constantly see the most violent attacks upon the President--upon the different generals and their measures."[66] Yet President Davis was said to have remarked that he "would not live in a country that did not tolerate freedom of the press"[67] and, in response to a question as to why he did not suppress the hostile Richmond Examiner, replied that nothing would be gained if the South were "to win independence by losing liberties."[68] The only suggestion that Davis was inclined to retaliate occurred when he vetoed a bill allowing free postage for newspapers mailed to military personnel. Some critics charged that it was to spite editors who had been critical of his administration.[69]

In July, 1861, Thomas A. R. Nelson made a speech in Carter County, Tennessee, urging the audience to resist the actions of the seceded state government and pledging his support for the Lincoln administration. While on his way to Washington he was arrested by a company of home guards in Lee County, Virginia, transferred to a jail in Richmond, and held on charges of treason. Davis ordered his release, stating that it was the Confederate government's policy "not to enter into questions of differences of opinion hereafter existing."[70]

While advocating freedom of expression at home Davis was often critical of measures employed by the United States government in response to political opposition, citing the suppression of newspapers and the jailing of editors in Ohio and Pennsylvania as well as the arrest of public officials in Maryland.[71] In his inaugural address at Richmond on February 22, 1862, after almost a year of military hostilities, he compared the experience in the South with that of the North, saying:

> For proof of the sincerity of our purpose to maintain our ancient institutions, we may point to the Constitution of the Confederacy and to the laws enacted under it, as well as to the fact that through all the necessities of an unequal struggle there has been no act on our part to impair personal liberty or the freedom of speech, or thought, or of the press. The courts have been open, the judicial functions fully executed, and every right of the peaceful citizen maintained as securely as if a war of invasion had not disturbed the land.[72]

One historian, acknowledging the government's toleration of hostile criticism, suggested that there might have been too much freedom of expression in the South, blaming the lack of censorship of military news and soldiers' mail for the destruction of public and military morale.[73] Even some editors thought that the press had little to fear from the Davis administration but cautioned that it could be endangered by "the reckless abuse and excessive license practiced by some of its [freedom of the press] advocates and expounders."[74] Another historian agreed that in addition "to the malignancy of the anti-Davis newspapers was an overzealous feeling for freedom of the press--the right to publish anything the editor chose--and a lack of understanding of what might give aid and comfort to the enemy."[75] That assessment differed little from that of T. C. DeLeon, who, in 1890, wrote:

> Nowhere on the globe was the freedom of the press more thoroughly vindicated than in the Southern States of America. And during the whole course of the war, criticisms of men and measures were constant and outspoken. So much so, indeed, that in many instances the operators of the Government were embarrassed, or the actions of a department commander seriously hampered by criticisms in a paper. In naval operations, and the workings of the Conscript law, especially was this freedom felt to be injurious; and though it sprang from the perfectly pure motive of doing the best for the cause . . .still it might have been better at times had gag law been applied.[76]

Unfortunately gag law was applied at times. Under the suspension of the writ of habeas corpus the military commanders and provost marshals, unable to distinguish between military necessity and political persecution, often infringed upon constitutionally guaranteed freedoms of expression. One of the first conflicts between the army and the press concerned the reporting of military activities. On July 1, 1861, "while professing his belief in an unshackled press and his continued willingness to permit any of the representatives of the press to visit the camps in Virginia,"[77] Secretary of War Walker urged reporters to refrain from mentioning troop strength and movements.[78] Furthermore, the Provisional Congress had authorized governmental control of telegraphic transmissions relating to military activity, so between the requested voluntary censorship and the imposed wire censorship, reporting of military activity was sometimes restricted.[79]

Press response to Secretary Walker's request, however, was not all that he had hoped. The Charleston Mercury said that the press would cause greater harm to the nation by concealing vital information from the people than by anything they might print about military activity.[80] One reporter, after having his dispatch severely edited by the telegraph censors, complained that " to be consistent the Government should establish a censorship over the mail-bags, over the railway trains, and over the minds and tongues of men . . ."[81] Another reporter, frustrated over the difficulty of locating the proper officers to approve his dispatches and over the variances in what different officers would allow, suggested that the system of censorship be replaced with legislation "making reporters and editors responsible for censoring their own dispatches and subjecting them to fines and imprisonment for violations of security regulations."[82] Such a system, felt to be an improvement at the time, would have only brought the wartime concept of freedom of expression from a condition of prior restraint up to the definition advanced by Blackstone--actually a step backward under peacetime conditions.

Despite Walker's well-intended suggestions his permission to allow reporters to go into army camps was often of little consequence. Some generals issued orders prohibiting their officers from discussing military affairs with press correspondents.[83] Others totally excluded reporters from their command. One general even prohibited members of the press from remaining within twenty-five miles of his camp.[84]

Several reporters were arrested by military authorities during the war, but none was ever convicted. William W. Screws, of the Montgomery Daily Advertiser, was arrested by General Braxton Bragg for reporting troop movements; but he was released after being held for ten days.[85] Samuel Reid, of the Mobile Register, once had to flee Bragg's camp to avoid arrest. John Linebaugh, of the Memphis Appeal, was arrested on Bragg's orders.[86] Linebaugh was held on charges of treason for having reported troop movements and making unfavorable comments about Bragg, but after about two weeks he was released on a writ of habeas corpus by Judge O. A. Bull of Atlanta. Leonidas Spratt, a reporter for the Charleston Mercury and a former member of the South Carolina legislature, was arrested on spy charges but was released after convincing the authorities of his loyalty.[87] Another correspondent--Frank Smyth of the Petersburg Express--was also arrested by the local militia and jailed in Winchester, Virginia, until the Secretary of War ordered his release.[88] The only case that ever came to trial was that of L. H. Matthews, of the Pensacola

Observer. He was acquitted spy charges after having been arrested for publishing information concerning military affairs.[89]

When General Robert E. Lee complained that Richmond papers published reports of troop strength and movements, Secretary of War Randolph had copies of the letter sent to all the newspapers in the city, expressing his hope that no official steps would be necessary to stop such publications. "A more rigid censorship should be established by the papers themselves," he said, " or they will do much mischief. It is the ardent wish of the Department that this revolution may be successfully closed without the suppression of one single newspaper in the Confederate States . . ."[90]

Others, however, were less ardent in their concern. General Herbert declared martial law throughout the entire state of Texas on May 30, 1862. Among the orders issued were the requirements that every white male over sixteen years of age was to register "and to furnish such information as may be required of him."[91]

Five weeks later, General Earl Van Dorn declared martial law in the military department of south Mississippi and east Louisiana, proclaiming that "the seeds of dissension and dissatisfaction shall not be sown among the troops."[92] The order made it illegal to do or say or write anything undermining Confederate currency, and prohibited the publication of any article in the newspapers regarding troop movements. Furthermore, no article or editorial could be printed which might impair confidence in the commanding officers. Any violations could result in fines, imprisonment, and suspension of publication.

Earlier that same week, in the district to the north of Van Dorn's command, Asa Hodges was arrested on suspicion of disloyalty by order of Brigadier-General Adams and held without being charged. Adams reported that, in a conversation with a neighbor, Hodges "had given utterance to language of a very suspicious and disloyal character."[93] On July 2 General Bragg allowed the release of Hodges but suggested that he be admonished against future despondent talk concerning the Confederate States: "Such language may do as much hurt with the ignorant, weak and hesitant as downright disloyalty. In times like these Mr. Hodges does not play the part of a good citizen but actually of an incendiary when he sets to work to discredit the capacity, conduct and policy of the public authorities, the military especially, and it will not be permitted."[94]

Shortly after these actions Senator T. J. Semmes introduced and passed a resolution calling for a congressional study of means of limiting such military abuses of power. His position was supported in the House by Garnett of Virginia and Jones and Foote of Tennessee.[95] President Davis responded by issuing an order revoking the proclamations of martial law. He later replaced Herbert and Van Dorn.[96]

There were additional infringements by military forces. A civilian named Wigden was held in North Carolina as a prisoner of war for using "treasonable language."[97] Andrew McKee was tried by court-martial, found guilty of treason, and sentenced to be shot before he was released by a judge who ruled that private citizens were beyond the military court's jurisdiction.[98] It was suggested by some that Robert Toombs had been arrested by General Pierre Beauregard for a near-treasonous speech he had given in Savannah.[99] The office of W. W. Holden's anti-administration Raleigh Standard was destroyed by troops in September, 1863.[100] However, the incidents mentioned above were not part of any general or sustained pattern such as was found in other areas--like Richmond and East Tennessee.

Richmond, the seat of government, was also the base of an overzealous provost marshal: John H. Winder. Almost immediately after the writ of habeas corpus was suspended, a citizen named John Botts was arrested at his home before daybreak on March 2, 1862. His private papers were seized and examined by military authorities. He was held in a Richmond jail abmost two months

before being released on a parole of honor. Botts was required to take an oath that he would move to the interior of the state, not go more than five miles from his home, "nor express any opinion tending to impair the confidence of the people in the capacity of the Confederate States to achieve their independence."[101]

In another case Alden Bosserman, a Unitarian minister, was arrested and jailed for "expressing his contempt for the Confederacy in foolishly praying that 'this unholy rebellion should be crushed out.'"[102] Citizens were often arrested on such vague charges as disloyalty or using treasonable language. Winder also made arrests for slogans written on buildings.[103] The provost marshal once went so far as to threaten to suppress publication of the Richmond Whig if it did not "abandon its vicious habit of uttering unpalatable truths."[104]

One of the most-striking examples of the wartime restrictions on expression is seen in "General Orders, No. 31," issued by the Adjutant and Inspector General's office in Richmond on March 10, 1864. The writ of habeas corpus was suspended for thirteen offenses, nine of which were verbal crimes: (1) treason or treasonable efforts to subvert the government, (2) conspiracies to overthrow the government or conspiracies to resist lawful authority, (3) communicating intelligence to the enemy, (4) conspiracies to incite servile insurrection, (5) encouraging desertions from the armed forces, (6) holding correspondence with the enemy without necessity or permission from the Confederate States, (7) conspiracies to liberate prisoners, (8) conspiracies to aid the enemy, and (9) advising or inciting others to abandon the Confederate cause.[105]

In eastern Tennessee, where citizens of the mountainous counties had voted 2-1 against secession, the military commanders had an especially difficult time maintaining loyalty to the cause. Brigadier-General Carroll, on November 29, 1861, stated that "the Government of the Confederate States has not nor will it interfere with individuals on account of their political opinions," but he would, however, arrest all "who in any manner may aid or abet its enemies or incite rebellion in order that they may be tried by military law."[106]

It appears that either those opinions mentioned above would be tolerated only as long as they were not expressed or that the term "in any manner" was broadly construed. In the case of Confederate States of America v. W. A. G. Reed the defendant was charged with treason for circulating a book "calculated to excite discontent and insurrection and rebellion, and with an intent to subvert and overthrow the government of the Confederate States."[107] Reed was released by the court after taking an oath of allegiance to the government--a widespread practice in such cases.

Colonel Wood, who was under Carroll's command, arrested Judge David T. Patterson, son-in-law of Andrew Johnson; Colonel Samuel Pickens, the state senator from Sevier County; several members of the Tennessee House of Representatives; and others of influence and distinction in east Tennessee in connection with armed resistance and the destruction of important railroad bridges. These men, he said, encouraged the rebellion, "but have so managed as not to be found in arms. Nevertheless all their actions and words have been unfriendly to the Government of the Confederate States."[108] Wood said that they "really deserve the gallows . . . [but] . . . it is a mere farce to arrest them and turn them over to the courts."[109]

No jury impaneled in that area of the state would convict the prisoners. The Confederate States district judge was more lenient than Judge Halyburton in Richmond,[110] who dismissed charges or released on oath 109 of 109 such cases before him.[111] In view of these facts the important prisoners were sent to a detention camp for political prisoners in Tuscaloosa, Alabama.[112] Others who were arrested for related resistance activities were released after being required to take an oath that they would "not directly or indirectly by talking, writing or otherwise seditiously or rebelliously attempt to excite prejudice in the mind of any person or persons against the existence, perpetuity or prosperity of said Confederate States."[113]

The most famous case of political repression in Tennessee was that involving William G. "Parson" Brownlow, editor of the Knoxville Whig and a future governor of the state. A vocal and vociferous Union man, with an editorial sytle that seemed to have been influenced by his pulpit style, Brownlow soon became a target of Confederate States Attorney J. C. Ramsey. Ramsey already had a reputation for arresting citizens and hauling them into court without warrants, merely for being Union men. It was even said that "an old man named Duggan, a Methodist preacher, was arrested . . . and all they had against him was that in February last (before sucession) he prayed for the Union."[114] Reports of these activities had prompted President Davis to instruct Secretary of War Benjamin to take action to "prevent as far as we may such proceedings . . ."[115]

Ramsey once said that Brownlow's paper was "the greatest cause of rebellion in this section and most who have been arrested have been deluded by his gross distortion of the facts and incited to take up arms by his inflammatory appeals to their passions and infamous libels upon the Confederate States."[116] On December 6, 1861, a warrant for Brownlow's arrest was issued by Confederate States Commissioner Reynolds. The warrant, upon Ramsey's affidavit, charged that Brownlow "did willfully, knowingly and with malice aforethought and feloniously commit the crime of treason against the Confederate States by . . . publishing a weekly and tri-weekly paper known as Brownlow's Knoxville Whig; and said paper . . . contained weekly divers of editorials written by said Brownlow which said editorials were treasonable against the Confederate States of America, and did then and there commit treason and prompt others to commit treason; by speech as well as publication as aforesaid commit treason and did give aid and comfort to the United States . . ."[117]

In a letter written to President Davis from his prison cell Brownlow stated that "the publication of a newspaper, however objectionable its matter might be, cannot amount to treason."[118] One of the editorials for which he was arrested gives an indication that he had been harassed previously and was expecting to be arrested. It further illuminates his views on freedom of the press in the Confederate States of America. In the issue of October 26, 1861, he wrote:

> The real object of my arrest and contemplated imprisonment is to dry up, break down, silence and destroy the last and only Union paper left in the eleven seceded States and thereby to keep from the people of East Tennessee the facts which are daily transpiring in the country. After the Hon. Jeff Davis had stated in Richmond in a conversation relative to my paper that he would not live in a government that would not tolerate freedom of the press--after the judges, attorneys, jurors and all others filling positions of honor and trust under the "permanent Constitution" which guarantees freedom of the press--and after the entire press of the South had come down in thunder tones upon the Federal Government for suppressing the Louisville Courier and the New York Day-Book and other secession journals--I did expect the utmost liberty to be allowed to one small sheet whose errors could be combated by the entire Southern press. It is not enough that my paper has been denied a circulation through the ordinary channels of conveyance in the country but it must be discouraged all together or its editor must write and select such articles as meet the approval of the scoundrels in Knoxville when their superiors in all the qualities that adorn human nature are in the penitentiary of our State. And this is the boasted liberty of the press in the Southern Confederacy.[119]

Brownlow was never tried on the charges, because the President ordered that he be released and allowed to go beyond Confederate lines. Ramsey entered a nolle prosequi in late December. After a brief detention by military authorities Brownlow went to the North, where he continued to speak out against the Confederate government.[120] After U. S. forces reoccupied Tennessee in 1863, Brownlow returned to edit the Knoxville Whig and Rebel Ventilator and

later became governor when the state was readmitted to the Union.

The events in Tennessee and the actions of the military authorities throughout the South represent unique conditions, which must be understood in any analysis of the concept of freedom of expression in the Confederate States of America. These practices were beyond the Constitution in that the privilege of the writ of habeas corpus was suspended and martial law sometimes imposed, yet they were within the Constitution in that the Congress had constitutionally authorized the suspension. Their true significance can only be evaluated and understood in relation to other aspects of the problem.

The Pressure of Public Opinion

Even before the formation of the confederacy the states of the South had endured a generation of growing restrictions on the freedom of expression for the white population and several generations of no freedom of expression for the black population. The influence of these trends could scarcely have been expected to disappear with secession, regardless of the new government's policies.

Evidence of a continuing repressive psychology can be seen in several unofficial acts at the local level. In Georgia one grand jury admonished "disloyal citizens who were speaking disparagingly of the government at Richmond, cautioning them to 'stop their impudent and imprudent mouths.'"[121] Another recommended legislation forbidding subscription to the New York Tribune.[122] George Fitzhugh, an antebellum defender of the exploitation of both slaves and free labor, held that "newspapers should not be privately run, but that each state and the Confederacy should have their official press and that no other newspaper should be allowed to exist."[123]

Several newspapers, though not destroyed by overt action, were the victims of public pressure. The New Orleans True Delta and the Richmond Whig were both forced to change their editorial policy to survive.[124] Those papers which did not change their position, such as the Union Banner in Athens, Alabama, the Wilmington Daily Herald in North Carolina, the Charlottesville Review in Virginia, and The Christian Banner of Fredricksburg, Virginia, were forced to suspend publication soon after the war began. This was because of a drop in number of subscribers and the withdrawal of official patronage of legal notices.[125]

In some sections vigilance committees took it upon themselves to arrest, try, convict, and punish strangers and local residents whom they considered to be disloyal.[126] One citizen so tried was Robert S. Tharin, a former law partner of William L. Yancey, of Wetumpka, Alabama. He was tried by a local beat court, convicted, and banished from his community "for expressing and endeavoring to propagate sentiments that were dangerous to the peace of society. He had conversed with several non-slaveholders . . . [and] . . . said that he was going to establish a newspaper (at Montgomery), to be called the Non-Slaveholder."[127] Among others who were forced to flee their home states were John H. Aughey, a Presbyterian minister in Mississippi; and State Senator Isaac Murphy, of Arkansas.[128]

Mayor William D. Branch, of Lynchburg, Virginia, ordered the arrest of George Gross in May, 1861, and held him without formal charges. Explaining his actions to the governor, Branch said, "He claims now to be a Republican. Having expressed such sentiments I thought he ought not to be allowed to travel through the country and committed him to jail."[129] Although some probably thought republicanism to be "more of a conspiracy against the South than a political party,"[130] Gross was released by Governor Letcher after taking an oath of fidelity to the Confederacy.[131]

On the other hand, the Civil War period was also a time of progress toward a less-restrictive society. In 1862 the Georgia legislature, in contrast with antebellum statutes forbidding teaching slaves to read or write, moved to repeal earlier laws against issuing preaching licenses to Negroes or slaves.[132]

While the practice of state regulation of religious expression and the licensing of speakers is foreign to the concept of free expression today, the action was a significant step forward.

There had been an increasing solidarity among southern political leaders in Congress since the debates on the Missouri Compromise, but following secession that trend was either reversed or exposed as a thin facade. Governors Zebulon B. Vance of North Carolina and Joseph E. Brown of Georgia were often critical of the Davis administration and led their states in legal battles against conscription and suspension of the writ of habeas corpus. Former Governor Sam Houston of Texas and former Senator Robert Toombs of Georgia were openly contemptuous toward the government. Congressman Henry S. Foote defected to the North before the war was over. Davis was even forced to contend with the often-hostile criticism of his Vice-President: Alexander H. Stephens.

The previously discussed armed resistance of the civilian population in east Tennessee was the most obvious but not the only indication of popular opposition to the Richmond government. In Mississippi one county declared its independence from the Confederacy. The mountain regions of Arkansas, Alabama, Georgia, North Carolina, and Virginia all had strong and active peace societies throughout the war.[133] It was a time of increasingly open criticism of the government as well as a time of continued suppression. To better understand the broader conception of freedom of expression one must interpret these paradoxical events from a comparative point of view.

Summary and Interpretation

The concept and practice of freedom of expression in the Confederate States of America will be evaluated from three perspectives: (1) a comparison with the practices prevailing in the remaining United States during the same period: 1861-1865; (2) an investigation of the concept relative to its understanding and practice in the United States during other periods of war; and (3) an analysis of the concept on a continuum from the Blackstonian definition to the present development of First Amendment theory.

Secretary of War Randolph, in voicing support for freedom of the press, expressed his wish that the Confederate experience would "be able to challenge comparison with our enemy."[134] That seems to have been the same standard of measurement used by President Davis. It has also been applied by later historians. "Taken as a whole . . . the government's answer to disloyal conditions was within constitutional limitations," wrote Robinson. "Its restricted use of martial law and its limited suspension of the writ of habeas corpus, only when authorized by Congress, stand in marked contrast to Lincoln's unrestrained use of extra-constitutional measures."[135]

The case of John Merryman provides an example of the contrast of which Robinson wrote. Merryman was arrested by Union troops and held in Fort McHenry without the privilege of the writ of habeas corpus, which had been issued by Judge Taney. Both the military authorities and President Lincoln ignored the writ and a subsequent decision declaring Lincoln's exercise of power to be unconstitutional. Merryman was later indicted for treason.[136] President Davis, however, only suspended the privilege upon statutory authority from Congress. This authority was granted only for a period of sixteen months during the four years of war.

Another point for comparison is Lincoln's proclamation of September 24, 1862, ordering that persons suspected of disloyal activities should be subject to trial by courts-martial and military commissions.[137] This practice was never authorized by Congress. The issue was conveniently avoided by the United States Supreme Court until after the war.[138] The Confederate States Congress, on the other hand, passed a resolution denying military authority over civilians or civil courts. The courts ruled to the same effect.[139]

Postal authorities in the South had censored mail, especially

newspapers, from the North during the antebellum period. This policy continued during the war, although mail from within the South escaped censorship.[140] Mail censorship, though, was not a practice limited to Confederate authorities. After the capture of New Orleans, United States officers regularly opened and read the personal correspondence of southern citizens.[141]

Likewise, the military authorities of the Confederate government did not always support the press; but one historian proclaimed that "no newspaper was ever suppressed by state or Confederate authority throughout the war . . ."[142] While that statement could be questioned in regard to the Knoxville Whig and the Raleigh Standard, the advance of United States forces did not present any remarkable advances for freedom of speech and press. Sherman's troops systematically destroyed the telegraph lines to disrupt transmission of military communications. This also prevented transmission of newspaper reports.[143] Although this effect was secondary, other actions of the general were not. In May, 1863, his troops destroyed the printing plant of the Jackson Mississippian. Two years later, in North Carolina, "the destruction of newspaper offices was a primary objective of his army. In Fayetteville, Sherman's soldiers completely destroyed the offices of the Telegraph and the Observer and were alleged to have offered a reward of $10,000 for the body of E. J. Hale, the senior editor of the Observer."[144]

One author, noting the tendency of myths to control southern history, suggested that "the notion of Southern freedom of the press during the Civil War is another myth that must be discarded in the interest of a proper understanding of the Southern past."[145] A contemporary northern observer in the South, however, suggested that "liberty of the press is carried to its fullest extent."[146] A true assessment probably lies between these two contentions. Freedom of expression, when measured by prevailing practices in the United States during the same period, was no more repressed in the Confederacy than in the United States.

The primary factor that made the concept in both countries indistinguishable was the common legal heritage. The primary factor that made the practice by both countries indistinguishable was the common military conflict. The government of the Confederate States of America was at war during forty-eight of its fifty-month existence. All wars seem to have devastating effects upon civil liberties, especially freedom of expression.

The activities of the Confederate military commanders have been shown to be no more repressive than those of their contemporary Union counterparts. The same might be said of the civilian governments. As Arthur M. Schlesinger has stated and as Leonard W. Levy has agreed, during the American Revolution "liberty of speech belonged solely to those who spoke the speech of liberty."[147] The experience of the United States during World War I offers numerous examples of judicial repression, from both judges and juries, in regard to political expression.[148] Mr. Justice Holmes suggested, "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[149]

The Confederate judicial experience was, in some respects, more favorable. When the privilege of the writ of habeas corpus was not suspended, the courts proved to be quite lenient. Confederate District Judges James D. Halyburton (Virginia) and West H. Humphreys (Tennessee) both had widespread reputations for issuing writs to release prisoners charged with treason, desertion and discouraging enlistment.[150] In North Carolina, Chief Justice Pearson became notorious for similar practices. In Tennessee juries were sure to acquit almost all such defendants.[151] Few persons were ever indicted for verbal crimes; but when they were, the defendants were usually acquitted or the cases were merely continued from session to session without trial.[152]

The arrest and detention of reporters as well as civilians under suspension of the writ certainly had a chilling effect on political expression

during the Civil War; but the abuses by government and military personnel were no more severe than during other periods of war, and the attitudes of judges and juries may have been somewhat less so. In such a comparison it does not appear that the statutory or constitutional provisions of the Confederacy made any significant difference in the way freedom of expression was viewed.

Finally, it should be determined just what the framers of the Constitution and those members of Congress whom they restrained understood freedom of expression to mean. While the convention debates are uninstructive, a review and explanation of the prevailing practices will provide some idea of what was meant by the protection given in Article I, Section 9.12 of the Constitution.

When reporter Samuel C. Reid, Jr. urged his editors at the Montgomery Daily Advertiser to lobby for legislation repealing the system of military censorship and making the press responsible for the consequences of their actions, it seemed that he would have been satisfied if the government of the Confederate States of America would only accept the Blackstonian doctrine of "no previous restraints upon publications . . . [with liability] . . . for criminal matter when published."[153] Such a conclusion may be valid with reference to wartime measures, since the authorization for telegraphic censorship was a war statute and generally limited to information concerning military operations; but the practice of free expression was much broader in other areas.

The Confederate House refused even to allow introduction of a resolution censuring a newspaper for attacking the integrity of the Congress, and the Senate gave further evidence that the concept of seditious libel was dead when it amended a resolution by striking language concerning abuses of freedom of speech and press, including speech that might disturb the peace or be considered an incitement.[154] When legislation was presented to curb political expression, its passage was prevented by comparing it with the Sedition Act of 1798.[155] President Davis, too, remained firm in his support of a free press even in the face of hostile personal and political attacks.

The action of the Senate in expelling a reporter for an attack on one of its members serves to illustrate the precise development of the concept of freedom of the press. The committee report on the incident revealed that the solons did not conceive protection to include the right to gather news. That right, with respect to reporting Senate debates, was a privilege to be extended by the Senate--an understanding consistent with the assumed right of the Senate to hold secret sessions but inconsistent with present theory embodied in freedom-of-information legislation. For violation of the privilege the Senate responded by withdrawing it from that particular reporter rather than by enacting punitive measures. Furthermore, the senators rejected a resolution to exclude other reporters from the same newspaper even after the editors had taken responsibility for the publication and voiced their support of the reporter's interpretation.[156]

The concept and practice of freedom of expression in the Confederate States of America, 1861-1865, differed little from that in the United States at the same time, and its response to military conditions was remarkably similar to the response of American governments during other wars. The concept went beyond the Blackstonian definition of no prior restraint to allow unbridled criticism of public men and measures, but it did not include the latitude that has developed in United States constitutional law since the time of the Holmes-Brandeis dissents of the 1920s. While the previous climate of repression with regard to abolition sentiments, the contemporary atmosphere of repression concerning Union sentiments, and the measures connected with the conduct of war all prevented expansion of the rights of speech and press under the government of the Confederate States of America, neither the general concept nor the practice of freedom of expression was diminished as a result of actions by the Confederate government.

Endnotes

[1]Clement Eaton, The Freedom-of-Thought Struggle in the Old South (New York: Harper & Row, 1964), p. 121.

[2]Clement Eaton, A History of the Southern Confederacy (New York: The MacMillan Company, 1954), p. 60.

[3]Leonard W. Levy, Freedom of Speech and Press in Early American History: Legacy of Suppression (New York: Harper & Row, 1963). See also T. F. Carroll, "Freedom of Speech and of the Press in the Federalist Period: The Sedition Act," 18 Michigan Law Review 615 (1920).

[4]Eaton, The Freedom-of-Thought Struggle in the Old South. For other discussions of the same period see Russel B. Nye, Fettered Freedom: Civil Liberties and the Slavery Controversy, 1830-1860 (East Lansing: Michigan State University Press, 1963); Harold L. Nelson, ed., Freedom of the Press From Hamilton to the Warren Court (New York: Bobbs-Merrill, 1967), pp. 167-220; and Arnold E. K. Nash, "The Judicial Defense of Liberalism in the South Atlantic States, 1831-1861," unpublished senior honors thesis, Harvard University, 1958.

[5]Harry Kalven, Jr., The Negro and the First Amendment (Chicago: University of Chicago Press, 1965).

[6]Franklyn S. Haiman, Freedom of Speech: Issues and Cases (New York: Random House, 1965), p. xv; Zechariah Chafee, Jr., Free Speech in the United States (Cambridge: Harvard University Press, 1948), p. 437.

[7]William M. Robinson, Jr., Justice in Grey: A History of the Judicial System of the Confederate States of America (Cambridge: Harvard University Press, 1941), p. 620.

[8]A. L. Hull, ed., "The Making of the Confederate Constitution," Publications of the Southern Historical Association, 9 (1905), 274.

[9]Hull, p. 275.

[10]Robert Hardy Smith, An Address to the Citizens of Alabama on the Constitution and Laws of the Confederate States of America (Mobile: Mobile Daily Register Press, 1861), quoted in Charles Robert Lee, Jr., The Confederate Constitutions (Chapel Hill: University of North Carolina Press, 1963), p. 58.

[11]Journal of the Congress of the Confederate States of America, 1861-1865 (Washington, D.C.: Government Printing Office, 1904-1905), I, 19.

[12]J.L.M. Curry, Civil History of the Government of the Confederate States (Richmond: B.F. Johnson, 1901), p. 50. See also Alexander H. Stephens, A Constitutional History of the Late War Between the States (Philadelphia: National Publishing Company, 1868), I, 339; Jefferson Davis, The Rise and Fall of the Confederate Government (Richmond: Garrett and Massie, 1938), I, 202.

[13]Journal of the Confederate Congress, I, 39.

[14]James M. Matthews, ed., The Statutes at Large of the Provisional Government of the Confederate States of America (Richmond: R.M. Smith, 1864), p. 3.

[15]Matthews, p. 16.

[16]Journal of the Confederate Congress, I, 872.

[17]Journal, p. 873.

[18]For an extensive and well-documented discussion of the Confederate

judiciary see William M. Robinson, Jr., Justice in Grey: A History of the Judicial System of the Confederate States of America (Cambridge: Harvard University Press, 1941).

[19]The Senate passed a bill authorizing a court composed of a chief justice and four associate justices, but the legislation was defeated in the House in the 1863 session.

[20]John V. Wright, in Bradley T. Johnson, John V. Wright, J.A. Orr, and L.Q. Washington, "Why the Confederate States of America Had No Supreme Court," Publications of the Southern History Association, 4 (1900), 92-93. See also C.E. George, "The Supreme Court of the Confederate States of America," 6 Virginia Law Review, N.S., 592 (1920).

[21]J.A. Orr, in Bradley T. Johnson, et al., p. 98.

[22]Curtis Arthur Amlund, Federalism in the Southern Confederacy (Washinton, D.C.: Public Affairs Press, 1966), p. 83.

[23]Robinson, p. 140.

[24]Burroughs v. Peyton, 16 Va. 470.

[25]Cobb v. Stallings, 34 Ga. 72.

[26]Albert B. Moore, Conscription and Conflict in the Confederacy (New York: Macmillan, 1924), p. 163.

[27]Sidney D. Brummer, "The Judicial Interpretation of the Confederate Constitution," Studies in Southern History and Politics (New York: Columbia University Press, 1914), p. 131, 8 Lawyer and Banker 387 (1915).

[28]Moore, p. 166.

[29]Joseph Gregoire deRoulhac Hamilton, "The State Courts and the Confederate Constitution," Journal of Southern History, 4 (1938), 425.

[30]Samuel H. Hempstead, ed., Reports of Cases Argued and Determined in the United States Superior Court for the Territory of Arkansas, from 1820 to 1836; and in the United States District Court for the District of Arkansas from 1836 to 1849; and in the United States Circuit Court from 1839 to 1856 (Boston: Little, Brown, and Co., 1856).

[31]Robinson, pp. 169, 146.

[32]One judge sitting in vacation held the law unconstitutional: In re Cain, 60 N.C. 525. Another would have done so had the issue been before the court: Ex parte Coupland, 26 Tex. 406.

[33]E. Merton Coulter, The Confederate States of America, 1861-1865 (Baton Rouge: Louisiana State University Press, 1950), p. 503.

[34]Richmond Examiner, 23 November 1864; Wilfred Buck Yearns, The Confederate Congress (Athens: University of Georgia Press, 1960), p. 20.

[35]Coulter, p. 505; Vicksburg Daily Whig, February 4, 1863, cited in J. Cutler Andrews, The South Reports the Civil War (Princeton: Princeton University Press, 1970), p. 288.

[36]Yearns, p. 20; Coulter, p. 503; Andrews, p. 531; Richmond Examiner, January 11, 1862.

[37]Journal of the Confederate Congress, III, 157; Andrews, pp. 289-290. Coulter reports incorrectly that the offense was that the reporter had garbled the senator's remarks (p. 449).

[38]Journal of the Confederate Congress, III, 100.

[39]Journal, p. 157.

[40]Journal, pp. 154, 156.

[41]Richmond Sentinel, January 14,1865; Richmond Dispatch, January 18, 1865; Andrews, p. 484; Journal of the Confederate Congress, VII, 457.

[42]James M. Matthews, ed., Public Laws of the Confederate States of America, 1862-1864 (Richmond: R.M. Smith, 1864), pp. 174-175.

[43]Charles W. Ramsdell, ed., Laws and Joint Resolutions of the Last Session of the Confederate Congress (November 7, 1864-March 18, 1865) together with the Secret Acts of the Provisional Congresses (Durham: Duke University Press, 1941), pp. 130-131.

[44]Ramsdell, p. 11.

[45]Matthews, Public Laws of the Confederate States, p. 129; Ramsdell, p. 21.

[46]Matthews, Public Laws of the Confederate States, p. 78.

[47]Matthews, Statutes of the Provisional Government, pp. 106-107.

[48]Andrews, p. 375. See T. J. O'Donnell, "Military Censorship and the Freedom of the Press," 5 Virginia Law Review 178 (1917).

[49]See, for example, Yearns, p. 153; Eaton, A History of the Southern Confederacy, p. 231; Robinson, pp. 398, 452; Frank L. Owsley, States Rights in the Confederacy, (Chicago: University of Chicago Press, 1925), p. 166.

[50]Journal of the Confederate Congress, II, 271.

[51]Journal, p. 272.

[52]Journal, pp. 308, 333, 435; Robinson, p. 432.

[53]Matthews, Public Laws of the Confederate States, pp. 1, 84, 187-189.

[54]Matthews, p. 1.

[55]Emory M. Thomas, The Confederacy as a Revolutionary Experience (Englewood Cliffs, N.J.: Prentice-Hall, 1971), p.63.

[56]John Minor Botts, The Great Rebellion: Its Secret History, Rise, Progress, and Disastrous Failure (New York: Harper & Bros., 1866) p. 279.

[57]Matthews, Public Laws of the Confederate States, p. 27.

[58]Matthews, p. 84.

[59]Journal of the Confederate Congress, III, 669-671.

[60]Brummer, p. 129.

[61]Public Laws of the North Carolina General Assembly (Adjourned Session, 1864), p. 191, cited in May Spencer Ringold, The Role of the State Legislatures in the Confederacy (Athens: University of Georgia Press, 1966), p. 29.

[62]Ringold, p. 33.

[63]Owsley, p. 191.

[64]Journal of the Confederate Congress, VII, 81-82, 266-267.

[65]Trexler, p. 177.

[66]Lieut. Col. Fremantle, Three Months in the Southern States; April-June, 1863 (New York: John Bradburn, 1864), p. 154. For examples of various press criticisms of military and civilian officials see Andrews, pp. 518-523.

[67]The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies (Washington, D.C.: Government Printing Office, 1880-1901, 128 vols.), Ser. II, Vol. I, 913; hereinafter cited as Official Records.

[68]Coulter, p. 503.

[69]Coulter, pp. 457-458.

[70]Official Records, Ser. II, Vol. I, 824-826.

[71]Jefferson Davis, A Short History of the Confederate States of America (New York: Belford, 1890), p. 382.

[72]James D. Richardson, ed., The Messages and Papers of Jefferson Davis and the Confederacy (New York: Chelsea House-Robert Hector, 1966, I, 184-185.

[73]Eaton, A History of the Southern Confederacy, p. 232.

[74]Coulter, p. 502.

[75]Coulter, p. 501.

[76]T. C. DeLeon, Four Years in Rebel Capitals: An Inside View of Life in the Southern Confederacy (Mobile: Gossip Printing Company, 1890), p. 289.

[77]Andrews, p. 76.

[78]Richmond Enquirer, July 1, 1861.

[79]Matthews, Statutes of the Provisional Government, pp. 106-107. The mails, however, were open for use by reporters even when the telegraph wires were censored (Andrews, pp. 343, 439). For a description of the codes voluntarily adopted by some of the southern newspapers see Andrews, pp. 529-530.

[80]Charleston Mercury, July 6, 1861; Andrews, p. 77.

[81]Mobile Daily Advertiser and Register, June 19, 1863; Andrews, p. 303.

[82]Andrews, p. 441; Montgomery Daily Advertiser, May 27, 1864.

[83]Andrews, p. 369.

[84]Andrews, pp. 156, 161, 515, 472-473.

[85]Andrews, pp. 236-237.

[86]Andrews, pp. 337, 349, 443. Reid was later arrested by the marshal at Atlanta but was released after a few days.

[87]Andrews, p. 103.

[88]Andrews, p. 103.

[89]Andrews, p. 62.

[90]Official Records, Ser. I, Vol. XI, Pt. iii, 636. For other such suggestions and warnings see Official Records, Ser. I, Vol. XXXV, Pt. i, 522; Vol. XLVI, Pt. ii, 1047; Vol. LI, Pt. ii, 626.

[91]Official Records, Ser. I, Vol. IX, 716.

[92]Official Records, Ser. I, Vol. XV, 771-772.

[93]Official Records, Ser. II, Vol. II, 1556.

[94]Official Records, Ser. II, Vol. II, 1557.

[95]Andrews, p. 532; Yearns, p. 153.

[96]Yearns, pp. 151-152.

[97]Official Records, Ser. II, Vol. II, 1367-1372.

[98]Robinson, pp. 199-201.

[99]Coulter, pp. 386-387.

[100]Eaton, A History of the Southern Confederacy, pp. 231-232; Coulter, p. 500.

[101]Botts, pp. 279-285; Official Records, Ser. II, Vol. II, 1547.

[102]Coulter, p. 91.

[103]Richmond Whig, March 6, 1862; Coulter, p. 500.

[104]Trexler, p. 187.

[105]Official Records, Ser. IV, Vol. III, 203-204.

[106]Official Records, Ser. II, Vol. I, 850.

[107]Robinson, pp. 288-289.

[108]Official Records, Ser. II, Vol. I, 845-846.

[109]Official Records.

[110]Coulter, p. 94.

[111]Robinson, p. 289; Official Records, Ser. II, Vol. I, 834.

[112]Robinson, p. 286.

[113]Official Records, Ser. II, Vol. I, 844.

[114]Official Records, Ser. II, Vol. I, 834.

[115]Official Records, Ser. II, Vol. I.

[116]Official Records, Ser. II, Vol. I, p. 907.

[117]Official Records, Ser. II, Vol. I, p. 922.

[118]Official Records, Ser. II, Vol. I, p. 921.

[119]Official Records, Ser. II, Vol. I, p. 913.

[120]Official Records, Ser. II, Vol. I, p. 917.

[121]Robinson, pp. 250-251.

[122]Coulter, p. 93.

[123]Coulter, p. 503.

[124]Andrews, p. 541.

[125]Andrews, p. 541; Eaton, The Freedom-of-Thought Struggle in the Old South, pp. 398-399.

[126]Coulter, p. 88.

[127]Robert S. Tharin, Arbitrary Arrests in the South; or Scenes from the Experience of an Alabama Unionist (New York: John Bradburn, 1863), p. 15.

[128]Coulter, p. 86; Eaton, The Freedom-of-Thought Struggle in the Old South, p. 392.

[129]Official Records, Ser. II, Vol. II, 1364.

[130]Coulter, p. 88.

[131]Official Records, Ser. II, Vol. II, 1365.

[132]Acts of the Georgia General Assembly (1862; Extra Session, 1863), p. 137; cited in Ringold, p. 59.

[133]For a more-detailed discussion of such incidents see A. W. Bishop, Loyalty on the Frontier, or Sketches of Union Men of the Southwest (St. Louis: R. P. Studley, 1863); Georgia Lee Tatum, Disloyalty in the Confederacy (Chapel Hill: University of North Carolina Press, 1934); and Ted R. Worley, "The Arkansas Peace Society of 1861: A Study in Mountain Unionism," Journal of Southern History, 24 (1958), 445-456.

[134]Official Records, Ser. I, Vol XI, Pt. iii, 636.

[135]Robinson, p. 628. For examples of Union suppressions of speech and press see Nelson, pp. 221-247; Dean Sprague, Freedom Under Lincoln (Boston: Houghton Mifflin, 1965); James Randell, Constitutional Problems Under Lincoln (Urbana: University of Illinois Press, 1951); and Sydney G. Fisher, "Suppression of the Writ of Habeas Corpus During the War of the Rebellion," Political Science Quarterly, 3 (1888), 454-488.

[136]Ex parte Merryman, 17 Fed. Cases 9487 (1861). See also Clinton Rossiter, The Supreme Court and the Commander in Chief (Ithaca, N.Y.: Cornell University Press, 1951), p. 25.

[137]C. Herman Pritchett, The American Constitution (New York: McGraw-Hill, 1968), pp. 380-381.

[138]Ex parte Vallandingham, 1 Wall. 243 (1864); Ex parte Milligan, 4 Wall. 2 (1866).

[139]Yearns, p. 154; Journal of the Confederate Congress, I, 393-394, 444; Robinson, pp. 199-201.

[140]Andrews, p. 529; Coulter, p. 503.

[141]Wickham Hoffman, Camp, Court and Siege (New York: Harper & Bros., 1877), pp. 77-79.

[142]Coulter, p. 503.

[143]Andrews, p. 469.

[144]Andrews, pp. 498; 271.

[145]Andrews, p. 540.

[146]Fremantle, p. 220.

[147]Arthur M. Schlesinger, Prelude to Independence (New York, 1958); cited in Levy, p. 176.

[148]For a discussion of such cases, which is beyond the scope of this study, see Thomas F. Carroll, "Freedom of Speech and of the Press in War Time: The Espionage Act," 17 Michigan Law Review 621 (1919); John P. Hall, "Free Speech in War Time," 21 Columbia Law Review 526 (1921); and Chafee, 36-305. J. J. O'Donnell, "Military Censorship and the Freedom of the Press," Virginia Law Review 178 (1917).

[149]Schenck v. United States, 249 U.S. 47 (1919).

[150]Coulter, p. 94; Official Records, Ser. II, Vol. I, 834.

[151]Official Records, Ser. II, Vol. I, 845-846.

[152]Andrews, p. 62; Robinson, pp. 201-202.

[153]Sir William Blackstone, Commentaries on the Laws of England, IV, 151.

[154]Journal of the Confederate Congress, VII, 457; II, 272.

[155]Journal of the Confederate Congress. II, 435; Robinson, p. 452.

[156]Journal of the Confederate Congress, III, 156-157.

FREE SPEECH AND THE RIGHTS OF CONGRESS: ROBERT M. LAFOLLETTE AND THE ARGUMENT FROM PRINCIPLE

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Though the United States was born in revolution, criticism of the government, especially in times of crisis, has been met with oppression of basic freedoms, especially the freedoms of expression. In recent times, for instance, dissent directed against our involvement in southeast Asia and against social and economic conditions at home have been met with harsh reprisals by the government.[1]

The decade of the sixties was hardly unique, however. Consider the federal government's infringement on personal freedoms. Perhaps the worst such infringement came in the period of our involvement in World War I. In waging war under presidential powers Woodrow Wilson attempted to curtail expression of dissent. Robert M. LaFollette, senator from Wisconsin, stood to address the rhetorical problem created by the Wilson Administration. LaFollette's efforts during our involvement in World War I were directed to the individual's role in the government and to the right of Congress to make war. As I shall argue later, LaFollette's speech in the Senate on "Free Speech and the Right of Congress to Declare the Objects of the War,"[2] was an unusual response to an insufferable situation, revealing LaFollette's opposition to the war and the government's infringements on individual rights. That speech epitomized the senator's position on the war. It was based on the argument from definition or principle according to the position explicated by Richard M. Weaver.[3]

Freedom of expression is sacrosanct in a democratic society. "The appropriate region of human liberty," John Stuart Mill argued,

> comprises, first the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people, but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.[4]

Mill explicated a fundamental human right: the right of freedom of expression on any issue so long as that expression does not interfere with the rights of other individuals. LaFollette's position echoes Mill's fundamental principle.

Throughout the first six months of World War I LaFollette argued that the United States was involved against the will of the people of this nation and that the war had been undertaken without proper congressional involvement. For his actions against the war LaFollette became a target of the government and the press. At one point, expulsion proceedings against LaFollette were considered by the Senate because of his remarks about the war.[5]

LaFollette used as the basis of his argument the inherent right of human beings to express themselves on issues directly affecting their well-being. He may well have responded directly to charges leveled against himself. He had been denied the fundamental liberty of expression. But the larger issue, he said, was that many other citizens had been denied their rights. LaFollette's strategic choice of argument from principle clearly established

him as a man who chose to defend the rights of humanity before defending himself.

LaFollette also argued that Congress had been ignored in the making of decisions vital to the prosecution of World War I. The basis of this argument were constitutional principles defining the powers of the executive and legislative branches of government. He saw a link between the rights of the people and the rights of Congress--a link that is basic to representative democracy: that the people must be allowed openly and freely to discuss those issues which affect them so that Congress can legislate effectively.

LaFollette argued for freedom of speech and individual freedom. He associated the congressional-rights issue with the more basic issue of free speech. Both were limited by the Wilson Administration during World War I. LaFollette's "Free Speech and the Right of Congress to Declare the Objects of the War"[6] can be viewed as a response to that situation.

Having been a victim of the outrage perpetrated by the government, LaFollette was a natural spokesman. It is interesting, however, that he chose to respond to the situation in an impersonal manner. The sole personal comment in the speech unrelated to his work in the Senate was a disclaimer: "If I alone had been made the victim of these attacks, I should not take one moment of the Senate's time for their consideration . . ." (7878,2). He argued for others who had similarly been victimized. He sought to right those wrongs: "*Neither the clamor of the mob nor the voice of power will ever turn me by the breadth of a hair from the course I mark out for myself, guided by such knowledge as I can obtain and controlled and directed by a solemn conviction of right and duty*" (7878,2). (Italics in the Congressional Record version of speech.) He believed that the war was being improperly prosecuted because the government was repressing the right of free speech and because Congress had not been properly included in monumental decisions. He chose to address the larger issues of free speech and the rights of Congress. As LaFollette's Senate record demonstrated, he willingly worked within the government to change those things which he felt were wrong.[7] Although LaFollette opposed most of the war measures, particularly those which circumvented individual liberty, he supported measures that enhanced our war effort. He explained this position in the text of "Free Speech." Speaking of the thousands of young men recruited for the war, he stated: "Nothing must be left undone for their protection. They must have the best army, ammunition, and equipment that money can buy. They must have the best training and the best officers which this great country can provide. The dependents and relatives they leave at home must be provided for, not meagerly, but generously so far as money can provide for them" (7885,2).

These are not the words of a man totally opposed to our war efforts. They demonstrate that LaFollette was willing, in part at least, to prosecute the war.

LaFollette not only spoke of providing for the soldiers already in the foreign war; he attempted to provide legislation for protecting their families. He sought to restructure the tax system so as "to raise the largest possible amount of money from surplus incomes and war profits for this war and upon other measures to provide for the protection of the soldiers and their families" (7885,2). This revenue measure was not passed, as might be expected. So the wealthy did not bear the burden of the war. But LaFollette was undaunted. He stated: "I did all that I could, and I shall continue to fight with all the power at my command until wealth is made to bear more of the burden of this war . . . We have not yet been able to muster the forces to conscript wealth, as we have conscripted men, but no one has ever been able to advance even a plausible argument for not doing so " (7886,1).

In effect, LaFollette argued that he was as concerned as many others for prosecution of the war; but if it was to be waged, it must be waged properly. He created the image of one concerned with the common people, of one who would work to provide for their needs. By so doing he showed himself to be principled, and his argument benefited from this.

Both arguments--for free speech and for proper congressional power--stemmed from principle. Both principles are fundamental to the democratic structure of the United States and are explicated in the Constitution. Mill argued that freedom of speech is a fundamental liberty and one that cannot be denied except as that freedom interferes with the freedoms of other persons. The basic tenet of democracy involves the interaction of citizens with their government. The two principles are interwoven philosophies of humanity and government.

Richard M. Weaver held that the argument from definition "includes all arguments from the nature of the thing"[8] and that it "involves a philosophy of being, which has divided and probably will continue to divide mankind."[9] The division Weaver cited seems to be a division between the idealist and the pragmatist. In this situation LaFollette chose the ideal rather than the practical because he argued from principle, from the truth inherent in the thing itself. Freedom of speech exists for all people, as Mill pointed out, regardless of the written law; but in our society it has also been inculcated into the Constitution. It would be fruitless to argue that the right of Congress to declare the objects of war is a natural right; it is, however, a right whose principle is contained in the Constitution as well as in various other legislative and judicial interpretations of the Constitution. It is one that is ideally determined by citizens working with their representatives. Human choice should be guided by these principles. In World War I, however, expediency guided choice. Repressive measures of the Wilson Administration bore witness to this denial of the principle in favor of what was felt to be necessary for the moment.[10]

Two key terms--"free speech" and the "rights of Congress"-- form the core of LaFollette's speech. He demonstrated that the two were alternatives to the status quo. He traced various American and British statesmen who exemplified freedom of speech in similar situations to support his contention that the status quo violated the principles of established precedence. American statesmen who, by example and word, expressed dissent and asserted freedom of speech in wartime included Henry Clay, Abraham Lincoln, Daniel Webster, Charles Sumner, and Thomas Corwin, all of whom voiced opposition to the Mexican War (7879, 1 to 7881,1). LaFollette followed this analysis with "Discussion by English Statesmen," a chronology that began with British criticism of British involvement in the war with the American colonies and reached into the twentieth century (7881, 1 & 2). The bulk of LaFollette's argument for free speech was based on those who examplified freedom of speech in circumstances similar to those in which LaFollette found himself.

After demonstrating that many American and British statesmen had opposed intervention in wars in their respective countries LaFollette concluded: "The principle of free speech was no new doctrine born of the Constitution of the United States. Our Constitution merely declared the principle. It did not create it. It is a heritage of English-speaking peoples, which has been won by incalculable sacrifice, and which they must preserve so long as they hope to live as free men" (7881,2). The principle of free speech preceded the Constitution. The right belongs to all. Reference to statesmen who opposed previous military involvement, both British and American, demonstrated that opposition to such involvement is a right guaranteed to all people. This is the position developed by Mill and one to which LaFollette adhered. He stated: "[It] is the right of the citizens of this country and their representatives in Congress to discuss in an orderly way frankly and publicly and without fear, from the platform and through the press, every important phase of this war; its causes, the manner in which it should be conducted, and the terms upon which peace should be made . . . I am contending, Mr. President, for the great fundamental right of the sovereign people of this country to make their voice heard . . ." (7878,2).

The administration had denied the right of the people and their representatives to engage in dialogue concerning these important questions. In effect it had violated the fundamental tenet of democracy: the will of the

people directs legislative assemblies to legislate and, by extension of power, directs the executive branch to execute the laws.

LaFollette also reduced to principle his argument concerning the right of Congress to declare war. To fortify the argument he used the same evidence used to establish the principle of freedom of speech. In introducing the evidence from these authorities LaFollette stated: "The authorities which I shall cite cover both the right of the people to discuss the war in all its phases and the right and the duty of the people's representatives in Congress to declare the purposes and objects of the war. For the sake of brevity, I shall present these quotations together at this point instead of submitting them separately" (7879,1).

This statement served two functions: LaFollette appealed to his hearers' sense of time. More importantly, he provided a solidly constructed foundation upon which to build a later argument for appropriate congressional power. This strategy led to expectations and directed the audience to consider the evidence in two distinct ways. LaFollette demonstrated the principle but also demonstrated the link between the fundamental right of free speech and the rights of Congress provided in the Constitution.

On this foundation LaFollette expanded his argument for congressional power. He cited precedents based on the Constitution and established further authoritative support (7883,1 to 7884, 2). This extensive analysis included a review of constitutional law by authorities who insisted that the major power of the Executive in wartime is that of Commander-in-Chief. LaFollette demonstrated that this power did not include the power to declare war or the objects of war. That power, he said, belongs solely to Congress.

From the point of constitutional authority LaFollette moved to an analysis of congressional treatment of the war-making power. Congressional intervention in the war-making power, according to the constitutional mandate for Congress to intervene, spanned the ninety years preceding our involvement in World War I (7884,1 and 2).

LaFollette concluded: "As the Nation's purposes in conducting this war are of supreme importance to the country, it is the supreme duty of Congress to exercise the function conferred upon it by the Constitution of guiding the foreign policy of the Nation in the present crisis" (7885,1). Despite this duty attempts by persons opposed to prosecution of the war were committing "treason to our country and [making] an effort to serve the enemy" (7884,2). This analysis was also based on principle--a principle that had been included in the Constitution as a protection against the type of governmental power imbalance which had been experienced in England and on the continent of Europe. The principle of a balance of power in the government is not vital, as is that of free speech, but it is nevertheless a principle fundamental to our government.

From the preceding analysis it may seem that LaFollette was drawing a clear-cut distinction between the right of free speech and the right of Congress to declare the objects of war. This was not so. The link between the two principles is evident--and it was vital to LaFollette's argument. That link is the relationship between an elected representative and his constituency, a relationship that ideally "discuss[es] in an orderly way frankly and publicly and without fear, from the platform and through the press, every important phase of this war . . ." (7878,2). Of Congress specifically LaFollette stated " Back of them is always the controlling sovereign power of the people, and when the people can make their will known, the faithful officer will obey that will" (7879,1). Then he asked: "Have the people no intelligent contribution to make to the solution of the problems of this war? I believe that they have, and that in this matter, as in so many others, they may be wiser than their leaders, and that if left free to discuss the issues of the war they will find the correct settlement of these issues" (7886,1). The decision on the issues ultimately rests in the power of Congress.

If that power is allowed to be properly exercised, Congress must be responsive to the wishes of its constituency.

Both principles are interrelated and reveal LaFollette's philosophy of humanity and government. Ideally people have the right to discuss the workings of their government and, by so doing, influence the government. LaFollette's address was a statement of these principles. The evidence he presented served to establish the pervasive nature of both principles. Freedom of expression can exist without a government to protect that right, but a democratic government is not worthy of the name unless the people form the basis of the democracy. That the individual is the foundation for a democracy is not a new concept, but LaFollette's line of argument when that concept was being threatened was important because it reaffirmed the principle of free speech and its relation to democracy at a time when both were threatened.

In effect LaFollette established two interrelated hierarchies that should function within the democratic government of the United States. Each was related to the principles from which LaFollette argued. The individual is at the peak of this hierarchy in the protection of those rights which stem from the principle. As LaFollette stated: "I think all men recognize that in time of war the citizen must surrender some rights for the common good which he is entitled to enjoy in time of peace. *But, sir, the right to control their own Government according to constitutional forms is not one of the rights that the citizens of this country are called upon to surrender in time of war*" (7878,2). (LaFollette's italics.) LaFollette was adamant in declaring that the voice of the people must be heard if the Congress is to perform its function properly. In this sense Congress became the mediating agent between the people and the Executive Branch.

LaFollette juxtaposed the ideal hierarchy, evolved from principles of democracy and the Constitution, against the hierarchy the status quo had established for practical reasons.[11] The status quo, in LaFollette's eyes, placed the Executive Branch of government at the top of the hierarchy. It asked for legislation and enforced it. The people were excluded from the process, and citizens became suspect when they opposed repression. This hierarchy clearly contradicted the ideal that makes government the servant of the people.

LaFollette linked the principle of free speech, which is a highly individualistic freedom, to the rights of Congress, which of necessity must be societally oriented. This link gave the speech a strength that would have been lacking had he chosen to address either principle without the other. An individual must have a voice in government whether he is a congressman or a shopkeeper. A representative is inexorably linked to the people. That link is strengthened by a free and open exchange between them. The link was weakened during Wilson's Administration.

Consideration of the audience was an important factor in LaFollette's address. The senator tried to provide a sounding board for those who had no access to the podium or the press. His choice was an excellent one, for his audience was not only the Senate gallery and the senators who listened to his pleas for the freedom of expression. Countless citizens who were only fractionally represented by the gallery comprised the larger audience that LaFollette addressed. His speech seemed to be addressed to those who were also opposed to the war but who were not allowed to express their views. In a sense the speech was not only to those who had been denied fundamental human rights; it was by those same people. Their voice echoed through the Senate chamber. In the sense of Edwin Black's "second persona" LaFollette linked his implied audience to the ideology he espoused.[12]

LaFollette's social philosophy placed the individual at the summit of society and demanded that the government serve the individual. The right of free speech, whether an individual right or a right of all people to speak freely, must be preserved. The preservation of individual rights is the

paramount responsibility of the government. Without this social and political system and the foundation on which it was developed the United States would not have been founded and could not continue.

Throughout the address LaFollette argued that when the government fails in its responsibility to its citizens, they have the right to protest. In World War I, however, that right was being denied. His argument was complex. The government was waging a war contrary to the principles established by the Constitution and subsequent interpretations. Some citizens, including LaFollette, objected to the manner in which the war was being waged. These citizens were exercising free speech and were being denied the right by legislation and executive order (7878). Citizens thus had the right to oppose this further denial of freedom, a freedom of natural right. Free speech and opposition to the war had been so effectively restricted by the Wilson Administration that most citizens had been silenced. Only a spokesman for those who had, in effect, been disenfranchised could give dissenters a voice in government. LaFollette attempted to be that spokesman throughout our involvement in World War I and particularly in his October 6, 1917, address to the Senate.

Both issues--free speech and the rights of Congress--were crucial then, as they are now. The argument for free speech concerns all people and is, in Mead's terms, "what is true for all [people] at all times."[13] The authorities, both American and British, which LaFollette sued for support were authorities of the highest order; they argued for the principle of free speech, just as did LaFollette. He re-established for his audience the fundamental right of free speech and argued that its denial during World War I was a serious breach of an inviolate principle. A more impassioned plea could have been made, but LaFollette argued in an uncharacteristically calm and rational manner.[14]

If the speech can be viewed as directed to a larger audience outside the Senate, and if the implied audience shared an ideology with LaFollette, his discussion of freedom of speech was appropriate. The includsion of the rights of Congress--an argument in and of itself--can be viewed as support for retaining freedom of expression in a pure form. LaFollette posited two distinct but intertwined arguments. His argument for free speech was based on a universal principle. His argument for the rights of Congress was linked to the more universal principle of free speech. The two arguments intertwined gain force because, in Weaver's words, they have "as a term giving intelligibility to the whole discourse, the Good."[15] The basic tenets of democracy were exemplified in LaFollette's discourse. Those tenets were grounded in a philosophic ideal: free speech.

LaFollette made a crucial rhetorical choice in addressing the issues of free speech and the rights of Congress when he might have refuted charges brought against him. Direct refutation of the charges could have been interpreted as an admission of guilt. Transcendence of the charges demonstrated that LaFollette was not treasonous, that he was interested in the people and the nation. His classic statement for the fundamental right of free speech echoed Mill and was expansive in its analysis of the rights of Congress. One may turn to Mill for explication of the principle of free speech and to the Constitution and its interpretations for an explication of the rights of Congress. The joining of the two issues in the World War I era is best viewed by close reading of Robert M. LaFollette's speech. Like Corwin, Clay, Webster, and Lincoln before him, he was a social critic who would not stand silent.

Endnotes

[1]"Persons of Interest," Life, March 26, 1971, pp. 20-27. For a more-recent example of the treatment of dissent in this nation see "The No-nuke Movement," Newsweek, May 23, 1977, pp. 25-26.

[2]Congressional Record, Vol. 55, part 8, 65th Congress (Senate), 1st

Session, October 6, 1917, pp. 7878-7886. Subsequent references to the text are cited parenthetically by page and column number.

[3]Richard M. Weaver, "Abraham Lincoln and the Argument From Definition," The Ethics of Rhetoric (Chicago: Henry Regnery Company, 1970), pp. 85-114.

[4]John Stuart Mill, "On Liberty," Essential Works of John Stuart Mill, edited by Max Lerner (New York: Bantam Books, 1965), p. 265.

[5]Full details about the events preceding the October 6, 1917, address may be found in several sources. The author recommends specifically Harry N. Scheiber, The Wilson Administration and Civil Liberties: 1917-1921 (Ithaca: Cornell University Press, 1960); Horace C. Peterson and Gilbert C. Fite, Opponents of War: 1917-1918 (Madison: The University of Wisconsin Press, 1957); David P. Thelan, Robert M. LaFollette and the Insurgent Spirit (Boston: Little, Brown, and Company, 1976); James R. Mock, Censorship: 1917 (Princeton: Princeton University Press, 1941); and works by members of LaFollette's family. These include Philip F. LaFollette, Adventure in Politics: The Memoirs of Philip LaFollette (New York: Holt, Rinehart, and Winston, 1970; and Fola LaFollette, Robert M. LaFollette, Volume II (New York: The MacMillan Company, 1953).

[6]Thelan's analysis of the period and LaFollette's remarks on the rights of Congress indicate the pervasive influence of the Wilson Administration in limiting those rights.

[7]Thelan, pp. 136-137, discusses LaFollette's efforts to distribute the cost of the war equally and his support of an alternate tax measure for support of the war.

[8]Weaver, p. 86.

[9]Weaver, p. 87.

[10]Weaver, "Edmund Burke and the Argument From Circumstance," Ethics, pp. 55-84. Weaver discusses the issue of expediency on page 57.

[11]It is evident that the Wilson Administration was guided by expediency.

[12]Edwin Black, "The Second Persona," The Quarterly Journal of Speech, Volume 56, April, 1970, p. 113.

[13]George Herbert Mead, "A Behavioristic Account of the Significant Symbol," Journal of Philosophy, Volume 16, March 16, 1922, p. 162.

[14]Fola LaFollette, p. 783. "His manner was neither excited nor repressed. There was no sense of oratory or climax." Quite often LaFollette's speaking could be characterized as vehement. See Robert T. Oliver, History of Public Speaking in America (Boston: Allyn and Bacon, Inc., 1965), p. 507.

[15]Weaver, p. 23.

THE SUPREME COURT AND THE FIRST AMENDMENT: 1977-1978

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I. The Nixon Legacy

Because they do not wish to appear politically involved or detract from the independence of their vote Supreme Court justices tend not to favor analysis of their voting patterns. Nevertheless, such analysis enables detecting shifts and trends within the Court on major issues in general and the First Amendment in particular.

Although Chief Justice Warren E. Burger and his three associates: Harry Blackmun, Lewis Powell, and William Rehnquist, all appointees of former President Richard Nixon, are currently voting together 67 per cent of the time compared to 75 per cent in 1973-74, they are still united in two thirds of the cases resolved by our highest court. Their compatibility of view has caused them to be in the majority five hundred times when united and the minority only four times in the past five years. The four-justice minority readily becomes a five- or six-vote majority because Kennedy-appointee Byron White and Eisenhower-appointee Potter Stewart have virtually become members of the Burger bloc as they side from 85 to 90 per cent of the time with the generally conservative nature of the bloc voters.

Justice John Paul Stevens, a Ford appointment, has joined with the Burger bloc less frequently (70 per cent of the time) while siding with the more-liberal justices Brennan and Marshall in 61 per cent of the Court's rulings. Although the number of split (5-4 or 6-3) decisions had been on the decline since 1972-73, Stevens, during his first full-term on the bench, caused a rise in the narrow-majority cases to 39 per cent--up 10 per cent over 1975-76.

Justice Brennan continues to dissent more frequently than the other justices while Thurgood Marshall comes in a close second. There is little doubt that the influence of Richard Nixon, through his appointments if not his convictions, has made a profound imprint upon our highest tribunal and its interpretation of the law.

The Burger bloc of four voted together and in the majority on five of the ten cases that involved substantial judgments about the First Amendment during the 1977-78 term. Three of the four were in the majority in nine of the ten cases. Had Blackmun not abstained in Houchins v. KQED* this would have held true in all ten cases. When the bloc needed help to secure a close majority, it got it three times from Potter Stewart, twice from Byron White, and once from John Stevens. Powell dissented twice, and Burger and Rehnquist once each. In no case did more than one member of the bloc dissent.

Three decisions were unanimous for all justices participating, but five were decided by no more than five votes for the majority position.

Justice Brennan voted with the majority only twice while Marshall sided with the bloc view on half of the First Amendment cases.

Noteworthy among the First Amendment cases this past term were those appearing to limit press freedom. A trend since the early 1970's to give the

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*Case citations for the 1977-78 Supreme Court term do not appear in this article because they are not assigned until a time subsequent to the preparation of this material.

press no advantage over any other business and no greater protection of legal process over any other people seems to have matured under the guidance of Chief Justice Burger. Because the Court did not award the press any special access to information or privileges not available to other citizens, some legal scholars have labeled the 1977-78 Court term as a disaster for the press. The truth in this reaction lies in whether or not the press is constitutionally entitled to special privileges. The issue at hand is whether the unquestioned right to disseminate information includes the unrestrained right to gather it.

The 1972 case of Branzburg v. Hayes (408 U.S. 665) declined 5-4 to grant reporters any constitutional exemption from answering grand-jury questions. The 1978 case of Zurcher v. The Stanford Daily is consistent with Branzburg in that in neither case does the press enjoy greater protection than would be extended to anyone else. The Stanford Daily result was a 5-3 ruling that police with a warrant could make a surprise search of a news office for photographs of a crime in which the paper was not involved. Although a newspaper office was searched, it can be argued that the case deals primarily with the right of police to search for evidence on premises owned by a party not suspected of any crime. At least this argument can be maintained if no special consideration is extended to protected status for the press as a detached third party. The Court concluded that adequate safeguards against interference with a free press exist when a warrant for searching press facilities is properly administered.

As the gag orders grow, records of newsmen get subpoenaed, and press-office searches get sanctioned, litigation increases, and more press cases will reach the Court on appeal from lower courts that sense ultimate support as they get tough with the press.

In other decisions the Court ruled 4-3 that the press has no greater right than the public generally to enter jails, interview inmates, and make sound recordings, films, and photographs (Houchins v. KQED); ruled 8-0 that the Federal Communications Commission can prevent the creation of newspaper-broadcast combinations since there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish" (FCC v. National Citizens Committee for Broadcasting); ruled 7-2 that broadcasters and record companies enjoy no right to information superior to that of the general public and thus cannot copy for sale or broadcast Nixon's White House tapes used in the Watergate coverup (Nixon v. Warner Communications); and ruled 5-4 that the FCC can discipline a radio station for airing language that is not legally obscene (FCC v. Pacifica Foundation). Yet to come are rulings on a judge who barred reporters from courtroom proceedings and another judge who required a reporter to answer questions posed during a civil libel suit.

Opinions announced in non-press-related cases during the 1977-78 term resulted in rulings that:

1. Juries deliberating obscenity cases must consider only adults in defining the "community" by whose standards the material is to be judged (Pinkus v. United States).

2. The free flow of commercial information is fostered by corporate managers who use corporate funds to communicate personal views even when irrelevant to business interests (First National Bank of Boston v. Bellotti).

3. A prison official enjoys a common-law immunity afforded government officials to interfere with a prisoner's mail unless knowingly in violation of a constitutional right (Procunier v. Navarette).

4. First Amendment guarantees prevail over state interests when there is no clear and present danger to the administration of justice (Landmark Communications v. Virginia).

5. When a lawyer solicits clients, the immediacy of the communication and the imminence of harm make this kind of communication less protected and properly within state-regulated commercial activity (Ohralik v. Ohio State Bar Association).

II. Opinions Rendered

Corporate Business

First National Bank of Boston et al v. Bellotti (46 LW 4371)

The appellants--banking and business interests--wanted to spend corporate money to publicize opposition to a proposed amendment to the Massachusetts constitution authorizing a graduated personal-income tax. They brought this action to challenge the constitutionality of a Massachusetts statute that forbids the use of corporate funds to publicize views about "issues having no material effect on the business, property or assets of the corporation." The lower court upheld the constitutionality of the Massachusetts statute, and the issue certified to the Supreme Court became "whether a state may prevent corporate management from using the corporate treasury to propagate views having no connection with the corporate business."

Justice Powell delivered the majority opinion (5-4) of the Court, which invalidated the Massachusetts statute and held that corporate managers enjoy a First Amendment right to use corporate funds to communicate fact and opinion representing their personal or collective views about political and social questions irrelevant to the business interests they represent.

Speech, Powell claimed, does not lose its constitutional protection because its source is a corporation "that cannot prove, to a court's satisfaction, a material effect on its business." Commercial speech receives constitutional protection, not because it pertains to the seller's business, but "because it furthers the societal interest in the 'free flow of commercial information'."

Justices White, Brennan, and Marshall joined in dissent. White noted that this decision to invalidate the Massachusetts statute "casts considerable doubt upon the constitutionality of legislation passed by some 31 states restricting corporate political activity." The dissent contended that the state regulatory interests represented in the statute are themselves derived from the First Amendment, thus raising the question whether or not the state by its own choice struck the best possible balance between competing First Amendment interests. Justice White objected to the Court's substitution of "its judgment as to proper balance for that of Massachusetts where the state has passed legislation reasonably designed to further First Amendment interests in the context of the political arena where the expertise of legislators" exceeds that of judges. White concluded by noting a "drastic departure" from the Court's prior protection of First Amendment interests that now are deemed "inadequate to justify the Massachusetts statute."

Prisoners

Procunier et al. v. Navarette (46 LW 4144)

Naverette, a prison inmate, claimed that prison officials, with "knowing disregard" for his rights to free speech and due process, wrongfully interferred with and confiscated his outgoing mail to legal-assistance groups, law students, the news media, other inmates, and friends.

The Court of Appeals reversed the District Court and held that prisoners are entitled to First and Fourteenth Amendment protection for their outgoing

mail. The Supreme Court reviewed the correctness of the reversal with respect to the legitimacy of the allegation that negligent interference with a constitutional right took place.

The Supreme Court, in an opinion delivered by Justice White with Justices Berger and Stevens dissenting, reversed the Court of Appeals and found that Procunier enjoyed a common-law immunity afforded government officials unless he knew or should have known that his alleged conduct violated a constitutional right. White held that Procunier's immunity was preserved because a malicious intent to harm was not proved and there was not such disregard for established law that the interference with Navarette's mail can be characterized as other than in good faith. Procunier could not have been aware of the constitutional right protecting the mailing privileges of prisoners, since at the time he acted this right had not yet been declared.

Justice Stevens passed over the argument that a prisoner's First Amendment rights had not been clarified and thus could not knowingly be interfered with. Stevens found neglect for Navarette's right of access to the courts and to legal assistance when his communication with law students and legal assistance groups was cut off. He concluded that the good-faith defense to the rights violation was not beyond being disproved.

The Press

Richard Nixon v. Warner Communications, Inc. et al. (46 LW 4320)

During the trial of Richard Nixon's advisers tape recordings of conversations held in Nixon's offices were played to the jury and the public in the courtroom and admitted into evidence. The jurors, reporters, and public in attendance were furnished transcripts, which were also widely reported in the press. Warner's petition for access to the tapes subsequently was denied by the District Court because the public's "right to know" did not supersede the need to safeguard the defendants' right on appeal.

The Court of Appeals reversed the District Court, holding that the public's right of access to the tapes and to judicial records was paramount.

The Supreme Court, in a 5-4 decision delivered by Justice Powell, reversed the Court of Appeals. Powell contended that any right to inspect and copy judicial records is discretionary with the trial court. The presence of the transcripts as reported by the press was an adequate alternative means of public access. The First Amendment guarantee of a free press did not require that the tapes be released, as "the question here is not whether the press must be permitted access to public information to which the public generally has access, but whether the tapes, to which the public has never had physical access, must be made available for copying." Under the First Amendment, the Court concluded, the press has no right to information superior to that of the general public. The guarantee of a public trial is met by the opportunity of the public and press to attend and to report what is observed. The press acquires no special benefit of access to information.

Landmark Communications v. Virginia (46 LW 4389)

A Virginia publication, a Landmark newspaper, accurately published an article reporting about an investigation by the Virginia Judicial Inquiry and Review Commission into the conduct of a state judge. Landmark subsequently was indicted and convicted under a Virginia law that imposes criminal sanctions for breach of the confidentiality of proceedings before the Judicial Inquiry and Review Commission. Landmark took the position that "truthful reporting about public duties is always insulated from the imposition of criminal sanctions by the First Amendment." The Virginia Supreme Court, faced with a confrontation between the First Amendment and the requirement of confidentiality

in commission proceedings, held that "sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings--the imminent impairment of the effectiveness of the Commission and the accompanying immediate threat to the orderly administration of justice."

The question presented to the U. S. Supreme Court was whether the First Amendment permits the criminal punishment of strangers to an inquiry, in this case the news media, for reporting truthful information regarding proceedings declared confidential by state law.

Justice Burger delivered the opinion of a unanimous Court (Brennan and Powell did not participate) which reversed the Virginia Supreme Court and held that Virginia's interests in criminal sanctions are "insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom."

Burger contended that the First Amendment assures discussion of governmental affairs and that this includes public scrutiny of the operation of the courts and judicial conduct. The question is not whether legitimate state interests are served but whether or not encroachment on First Amendment guarantees are necessitated by the magnitude of the state interests. In this case the encroachment is not warranted by the threat to a judge's reputation or that of the courts. Because no clear and present danger to the administration of justice exists when there are out-of-court comments on pending cases or grand-jury investigations, there can be no such danger resulting from accurate reports about the Virginia commission's proceedings.

Justice Stewart concurred in the judgment but claimed that the Constitution is violated only when Virginia extends an otherwise constitutional law to punish a newspaper. Stewart concluded: "If the Constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish. Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming."

Zurcher v. The Stanford Daily et al. (46 LW 4546)

The Stanford Daily brought action against law-enforcement officials, claiming that a duly authorized search for photographs revealing the identity of demonstrators who had assaulted police deprived The Stanford Daily of its First and Fourth Amendment rights. The District Court held such a search permissible "only in the rare circumstance where there is a clear showing that (1) important materials will be destroyed or removed from the jurisdiction; and (2) a restraining order would be futile." These conditions not being present, the Court of Appeals affirmed the District Court in support of The Stanford Daily's claim.

Although the case was decided principally on Fourth Amendment grounds, Justice White, in delivering the opinion for a divided Court, addressed himself to a First Amendment consideration. White held that preconditions for a search warrant such as probable cause, specificity of the place to be searched and things to be seized, and overall reasonableness must be carefully applied when First Amendment interests are endangered by the search. Adequate safeguards against interference with a free press exist when a search warrant is properly administered. The Stanford Daily's claim of constitutional interference was thus unfounded.

Justices Stewart and Marshall disagreed with the majority opinion. They sided with The Stanford Daily by contending that the search of newspaper offices by police is a self-evident burden on a free press. The First Amendment

harm lies in the inevitable interruption of the normal process of newsgathering, writing, editing, and publishing. By subpoena, rather than search, the newspaper would be afforded the best opportunity to locate requested material and produce it. The dissenters, however, found an even-more-serious burden created by an unannounced police search of a newspaper office. They expressed fear that the discovery and exposure of confidential sources will impair press fulfillment of its constitutionally designated function of informing the public because some information can be obtained only by assurance that the source will not be revealed. "Since the indisputable effect of such searches will thus be to prevent a newsman from being able to promise confidentiality . . . the end result, wholly inimical to the First Amendment, will be a diminished flow of potentially important information to the public." Stewart and Marshall concluded by disputing the notion that a newspaper office should enjoy no greater right to protection from unannounced police searches than the office of a doctor or a bank. Our Constitution, they asserted, offers to the practice of medicine or banking no explicit protection from government interference, but it does explicitly protect a free press.

Houchins v. KQED (46 LW 4830)

KQED, a broadcasting company, was refused permission to inspect and photograph specific jail facilities where conditions allegedly were responsible for a prisoner's problems. KQED brought this action against the jail supervisor for deprivation of First Amendment rights. Subsequently public tours of other parts of the jail were conducted. Media reporters were included, although cameras, recording devices, and inmate interviews were not allowed. The District Court granted KQED previously denied access to the jail. The Court of Appeals affirmed. The Supreme Court (4-3) reversed the lower courts.

Justice Burger was joined by Justices White and Rehnquist in holding that the First Amendment does not provide "a right of access to government information or sources of information within the government's control," and, in particular, the news media enjoy no constitutional right of access superior to that of other people. The public's need to know and the media's role of providing information about conditions in penal facilities afford no basis for any right to enter, gather information, and take pictures for broadcast purposes. Burger distinguished the freedom to communicate previously obtained information from compelling the government to provide information to the press.

Justice Stewart supported equal access to information for the public and the press but concluded that "terms of access that are reasonably imposed on individual members of the public may—if they impede effective reporting without sufficient justification--be unreasonable as applied to journalists." But in this case any press access to areas and sources of information excluded from the public tours would have been excessive relief for KQED and thus not justified.

Justice Stevens dissented because, although the public and the press have an equal right to receive information, "different methods of remedying a violation of that right may sometimes be needed to accommodate the special concerns of the one over the other." Stevens found no legitimate penological justification for concealing prison conditions from the public and that this would have protected the flow of information about prisons. The final judgment, according to Stevens, should not have rested on the right of the press to special treatment unlike that afforded the public but on the First Amendment abridgement by prison officials who sought to conceal information from the public "by arbitrarily cutting off the flow of information at its source."

FCC v. National Citizen's Committee for Broadcasting (46 LW 4609)

The Federal Communications Commission approved regulations prohibiting common ownership of a radio or television broadcast station and a daily newspaper located in the same community. However, divestiture of such combinations was not required except in sixteen flagrant cases in which the combination involved the sole daily newspaper published in a community and either the sole broadcast or the sole television station providing that entire community with a clear signal.

The appellate court affirmed the FCC regulations but laid stress upon the presumption that "stations owned by co-located newspapers do not serve the public interest." This presumption, the court emphasized, dictates across-the-board divestiture except "in those cases where the evidence clearly discloses that cross-ownership is in the public interest."

The Supreme Court, in a unanimous opinion of those voting (Brennan did not participate), upheld the FCC ban on common ownership but reversed the judgment that vacated the limited (flagrant situations) divestiture requirement. Justice Marshall delivered the opinion of the Court, which set forth five principal findings: (1) Providing the FCC reasonably promotes the public interest, regulations that cause diversification of the mass media as a whole are within the authorized scope of FCC activity. (2) The FCC acted reasonably in the public interest and, because of changed circumstances in the broadcasting industry, departed justifiably from prior decisions that allowed co-located combinations. (3) There is no violation of the First Amendment rights of newspaper owners because there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Since these regulations reasonably promote the public interest in diversified mass communications, they do not violate any First Amendment right of those denied a license under these regulations. (4) The FCC had to weigh the fostering of diversity against the disruption to the industry and individual hardship. They rationally opted for limited divestiture to preserve continuity of meritorious service by the media in the public interest. (5) The decision to "grandfather" most existing combinations must be regarded as judgment predicated on the FCC's expert knowledge of future public interest.

Obscenity

Pinkus v. United States (46 LW 4479)

The Supreme Court granted certiorari to rule on whether a lower court's instructions to the jury (in a trial for mailing obscene materials prior to 1973 and thus tried under the Roth-Memoirs standards) "could properly include children and sensitive persons within the definition of the community by whose standards obscenity is to be judged." In an opinion delivered by Chief Justice Burger the lower court was reversed for including children in the community assessment but sustained as to "sensitive persons."

Burger excluded children as part of the community when judging allegedly obscene materials because there wasn't any evidence that children were the intended recipients of the message and because the average person by whose standards obscenity is to be judged might very well result in a much lower "average" when children are part of the equation than if consideration were restricted to the effect of allegedly obscene materials on adults only. Burger, however, held that "the community" embraces all adults who compose it and that this includes sensitive people. The only harm would be in focusing on the most-susceptible community members rather than merely including them. Burger concluded that that it is not improper focusing and that nothing prevents a court from instructing a jury about prurient appeals to deviant sexual groups providing the materials in question were intended to arouse the prurient interest of

any reader or observer.

Justice Powell, in the only dissent, supported the majority view that the instruction including children should not have been given but found the error "harmless."

Broadcasting

F.C.C. v. Pacifica Foundation (46 LW 5018)

The lower court denied the Federal Communications Commission authority to discipline WBAI, a noncommercial FM station licensed to Pacifica Foundation, for a satirical monologue by George Carlin called "Filthy Words" broadcast during an early afternoon hour.

The Supreme Court, in a 5-4 decision delivered for the majority by Justice Stevens, reversed the lower court by finding logic in the FCC's "nuisance rationale" for discrediting the broadcast. Citing prior-court language, Stevens labeled a nuisance "a right thing in the wrong place--like a pig in the parlor instead of the barnyard." To regulate a pig in the parlor doesn't depend on proof that the pig is obscene, said Stevens. He contended that adults who "feel the need" to hear indecent language can purchase tapes and records or go to theaters and night clubs but acknowledged that the FCC left open the possibility that such material could be broadcast when there was little likelihood that children would be listening.

Pacifica's contention that the Federal Communications Act forbids censorship by the FCC was rejected because, although the FCC may not edit broadcasts in advance, the commission retains the power to review the content of completed broadcasts in performance of legitimate regulatory functions.

Stevens admitted that the FCC order "may lead some broadcasters to censor themselves" but held that this "will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities which surely lie at the periphery of First Amendment concern."

Justices Stewart, Brennan, White, and Marshall argued in dissent that Congress intended by "indecent" to prohibit nothing more than obscene speech."

Justices Brennan and Marshall added further dissent by protesting the majority claim that a broadcast had limited First Amendment protection because it intruded into the home. Brennan contended that the parents, rather than the government, should decide what children shall hear and admonished the majority for "acute ethnocentric myopia" about the language that "may be the stuff of everyday conversations in some . . . of the innumerable subcultures that comprise this nation."

Attorneys

Ohralik v. Ohio State Bar Association (46 LW 4511)

The appellant, an Ohio lawyer, obtained a written contingent fee agreement to represent an eighteen-year-old driver who was injured in an automobile accident. Her teenage passenger also agreed orally to a contingent-fee arrangement. Both women eventually discharged the appellant as their lawyer, but he brought suit against the driver for breach of contract and received a share of her insurance recovery. The two women filed complaints against the appellant with a bar grievance committee. A disciplinary board of the Ohio

Supreme Court found that the appellant solicited clients in violation of disciplinary rules and rejected the defense that his conduct was protected by the First Amendment. The appellant appealed his suspension by the Ohio Supreme Court, which adopted the board's findings but increased the penalty for solicitation.

Justice Powell, who delivered the opinion of the Court, noted that in Bates v. State Bar of Arizona, 433 US 350 (1977), the Court held that truthful advertising of routine legal services is a constitutional right but left open the permissible scope of regulation of impersonal solicitation of clients. The unanimous opinion in the case before the Court defined this scope by holding that the bar "acting with state authorization constitutionally may discipline a lawyer for soliciting clients in person for pecuniary gain under circumstances likely to pose dangers that the State has a right to prevent." Powell alluded to the common-sense distinction between speech proposing a commercial transaction, traditionally subject to government regulation, and other kinds of speech. Rather than "devitalize" the First Amendment, commercial speech was afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." Powell cited examples of speech regulated without abridging the First Amendment to illustrate that the state retains its power to regulate commercial activity harmful to the public even when speech is a component of the activity. Speech became an essential but subordinate component to a business transaction, not removed from First Amendment protection but subject to reduced judicial scrutiny.

The Court concluded that "unlike a public advertisement which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." Thus the immediacy of the communication and the imminence of harm make this kind of communication less protected than others.

III. Docketed: Other Cases

Disposed

The Supreme Court took action that in each of the following cases resulted in allowing the decision of the lower court to prevail except for one in which the judgment was vacated:

Criminal Law

Issue: When there is no statute to allow suppressing speech, can a conviction for disorderly conduct be upheld under circumstances whereby, after two warnings by a deputy sheriff, the accused was arrested because he would not be quiet? (Certiorari denied. Wright v. Bailey, 46 LW 3092)

Criminal Procedure

Ruling below the Supreme Court: Under Georgia law sexual devices that are "clearly" obscene and observable in "plain view" can be properly seized without a warrant or judicial determination of obscenity. Issues: Is mass seizure without warrant or allegedly obscene materials supportable under the "plain view" doctrine? Does a statute that defines "constructive knowledge" impermissibly chill dissemination of materials protected by the First Amendment? (Judgment vacated. Robinson v. Georgia, 237 SE2d 436. 46 LW 3491)

Ruling below: There is no violation of the First Amendment in a Texas Penal Code provision that punishes anyone who "threatens by telephone . . . to take any unlawful action against any person and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient or intends to annoy or alarm the recipient." Issue: Does the prohibition of speech that allegedly "annoys or alarms another person" violate the First Amendment? (Appeal dismissed. Collection Consultants, Inc., v. Texas, 556 SW2d 787, 46 LW 3500)

Issue: Is a local ordinance providing that "no person shall recklessly cause inconvenience, annoyance, or alarm to another, by . . . making . . . offensively coarse utterance . . . or communicating unwarranted and grossly abusive language to any person" so vague and overbroad that it violates the First Amendment? (Certiorari denied. Sonstegard v. City of Kettering, 46 LW 3500)

Issue: Does state law prohibiting unlicensed individuals or agencies from advertising that they will place or obtain children for adoption violate the First Amendment because it is vague and overbroad? (Appeal dismissed. Silverton v. California, 46 LW 3417)

Newspapers

Ruling below: Disclosure by a newsman of a confidential source during libel action is not protected by the First Amendment. Issues: May the court force disclosure of a confidential news source in civil litigation without considering alternative remedies less destructive of First Amendment rights? Must the court first establish that the confidential information sought is relevant to the litigation, otherwise unavailable, and of such importance that First Amendment rights should be subordinated? (Certiorari denied. Tribune Publishing Co. v. Caldero, 46 LW 3030)

Copyrights

Ruling below: A newspaper was properly prohibited from publishing extracts of copyrighted research reports because the paper failed to prove that the use of such reports was "either reasonable or pursuant to legitimate news reporting" as protected by the First Amendment. Issues: Can a newspaper, in advance of publication, be prevented from reporting news stories on research reports, which even may not yet be written and hence not yet copyrighted, regardless of newsworthiness or public impact of the reports? Is the right of a copyright proprietor superior to a newspaper's right to publish newsworthy statements that have impact on the public? (Certiorari denied. Wall Street Transcript Corporation v. Wainwright Securities, Inc., 46 LW 3391)

Defamation

Ruling below: A union newsletter article in which a union president criticized a credit-union president's insensitivity toward "union members' problems, needs, and desires" was found not to be libel per se under the Illinois "innocent construction rule" because the article inferred unsatisfactory communication and actually impugned credit-union policy rather than the president's business or professional reputation. Issue: Does the defense of free comment apply against a credit-union president in a public-official role? (Certiorari denied. Korbar v. Hite, 46 LW 3030)

Issues: Is proof that statements were distorted and misstated sufficient to constitute publication with actual malice and thus warrant summary judgment? Does a newspaper publisher of defamatory material injurious to the

reputation of a public official "have the duty to investigate sources and accuracy of information where the material being published is not 'hot news'"? Are defamatory conclusions predicated on false, misstated, or twisted statements published as fact sufficient to demonstrate actual malice? If you go beyond disinterested news reporting and personally attack public officials, can you still claim immunity under the New York Times rule? (Certiorari denied. Fodell v. Minneapolis Star and Tribune Co., Inc., 557 F2d 107, 46 LW 3246)

Issue: In order for a public official to show actual malice toward him must the official prove that libel was published with actual knowledge of its falsity? (Certiorari denied. Edwards v. National Audubon Society, Inc., 556 F2d 113, 46 LW 3345)

Issue: Is a consulting electrical engineer who prepares specifications for a state building sufficiently a public figure or official so that in order to recover he must show malice when charged with rigging specifications? The lower court said no, and the Supreme Court declined to hear the case. (Times-Picayune Publishing Co. v. Forrest, 347 So2d 1255, 46 LW 3656)

Ruling below: In a defamation action judgment for the defendants was ruled erroneous because they failed to show freedom from malice. Issue: Does a court commit error by ordering newsmen to disclose their confidential informants so the reliability and accuracy of the reports can be tested even though such disclosure would not tend to establish malice by the defendants? (Certiorari denied. Hubbard Broadcasting Inc., v. Ammerman, 46 LW 3700)

Ruling below: The author of a book on the criminal-justice system was constitutionally protected when he offered the opinion that a certain judge was incompetent and should be removed from office. Statements of opinion about public officials, "no matter how unreasonable, extreme, or erroneous, are protected if facts supporting such opinions are set out." Issues: Under New York Times v. Sullivan, 376 US 254 (1964), is there a sufficient showing of malice for a public official to successfully claim libel when (1) the accused charges the public official with being probably corrupt based totally on the perjury indictment of the judge (and does the judge have to prove that he is not probably corrupt?); (2) the accused charges that the judge awarded unduly lenient sentences (and does the judge have to show no unduly lenient sentences?); (3) the accused charges that "the judge puts people on the streets who sell death for a profit" and omits mention that the district attorney was responsible for the disposition of these cases? (Certiorari denied. (Rinaldi v. Holt, Rinehart and Winston, Inc., 46 LW 3344)

Issues: Is recovery for libel that was inadvertently published precluded by New York Times v. Sullivan, 376 U.S. 254 (1964), which requires a demonstration of actual malice in order to overcome the qualified constitutional privilege pertaining to public officials? Must reckless disregard be shown when actual knowledge of the falsity is proved? Does the phrase in New York Time v. Sullivan--"persons responsible for publication"--mean responsible from a causative or an administrative standpoint? (Certiorari denied. Glover v. Herald Co., 549 SW2d 858, 46 LW 3148)

Obscenity

Ruling below: The probation of a probationer was properly revoked for mailing obscene material from California to Illinois. Issue: Is a Louisiana federal court privileged to apply Louisiana community standards to determine the obscenity of material mailed from California to Illinois? (Certiorari denied. Hain v. U.S., 46 LW 3019)

Issue: May a jury in an obscenity case determine state-wide community standards without objective evidence about such standards? (Certiorari denied. Johansen v. California, 46 LW 3173)

Ruling below: The revocation of a liquor license on grounds that the licensee permitted females to display pubic hair did not violate the First Amendment. Issues: Can a state licensing authority prohibit a licensee from offering live entertainment of a type protected by the First Amendment and lacking "gross sexuality" and "incidents of Bacchanalian revelry" amounting to a public nuisance? Can a state licensing agency apply its rules without regard to the constitutional context and character of the performances to which the rule is applied? (Certiorari denied. Richter v. Rice, 46 LW 3175)

Ruling below: A bookstore owner's conviction for selling an obscene news magazine was affirmed. Issue: Was the defendant's right to a fair trial violated when the judge instructed the jury that most people disapprove of the type of magazine involved in this trial? (Certoriari denied. (Marler v. California, 46 LW 3158)

Ruling below: A Michigan obscenity statute defining obscenity and criminal-obscenity offenses prevents Michigan localities from enacting ordinances pertaining to the same subject matter. Issue: Does a municipality have the right under the First and Fourteenth Amendments and as construed in Miller v. California, 413 U.S. 15, to regulate obscene material? (Certiorari denied. City of East Detroit v. Llewellyn, 257 NW2d, 46 LW 3653)

Ruling below: The exemption of movie-theater employees from obscenity prosecutions under the Maryland Obscene Matter Act violates the equal-protection clause of the Constitution by drawing an unjustified distinction between such employees and employees of bookstores who are not exempt. Issue: Did the Maryland court misapply the Fourteenth Amendment by declaring improper any distinction between these employees, thus striking down a local regulation of unprotected speech? (Certiorari denied. Maryland v. Wheeler, 380 A2d 1052), 46 LW 3636)

Issue: For determining the obscenity standards to be applied to imported publications do the standards of the port of entry or those of the addressee's home apply? (Certiorari denied. Long v. US, 562 F2d 185, 46 LW 3635)

Issues: Is there an improper denial of Fourth Amendment rights by a city ordinance that permits seizure of film and arrest of exhibitors "without requiring that the judge view such film to determine if there is probable cause to believe it is obscene"? Is a constitutional requirement violated when the issuance of a warrant does not focus on the question of obscenity? (Certiorari denied. Robinson v. Birmingham, 46 LW 3683)

Communications

Ruling below: The protection of commercial speech under the First Amendment does not automatically result in the application of the fairness doctrine, particularly when controversial issues of public importance are not involved. Issue: Does the Federal Communications Commission violate the First Amendment or the Communications Act of 1934 by declining to apply the fairness doctrine to product advertising? (Certiorari denied. National Citizens Committee for Broadcasting v. FCC, 46 LW 3652)

Ruling below: Repeated violation of FCC operating rules is sufficient to refuse a license-renewal application. Issues: Did the lower court commit error by affirming an FCC denial of a license renewal based exclusively on an FCC assertation that a broadcaster violated rules of technical operation? Should First Amendment rights pertaining to the broadcast of religious programming also have been a consideration? (Certiorari denied. United Broadcasting Co., Inc. v. F.C.C., 46 LW 3391)

Issues: May a state court in a civil proceeding rely on the common-law policy that the "public has a right to every person's evidence" and order a news reporter to disclose confidential information despite constitutional guarantees? Without showing that alternative methods of discovery have been exhausted may a state court compel discovery of information in possession of a news reporter? (Certiorari denied. Oxberger v. Winegard, 258 NW2d 847, 46 LW 3685)

Public Employees

Ruling below: A city employee is entitled to a trial to resolve the issue of whether or not his discharge for political affiliation violated his First Amendment right to political association. Issue: Can a confidential employee in a non-policy-making role be discharged without due process? (Certiorari denied. Rizzo v. Rosenthal, 46 LW 3174)

Ruling below: Off-duty police officers who made public statements accusing the police department of racial harassment of minority citizens and prisoners may be reprimanded without violating their First Amendment rights. Regulations that authorize punishment for conduct reflecting discredit upon the police department are constitutional as applied. Issues: Are disciplinary actions that punish public criticism constitutionally permissible? Is a rule prohibiting speech reflecting discredit upon a police department or any member thereof too vague and overbroad? (Certiorari denied. Byrd v. Gain, 46 LW 3485)

Ruling below: The First Amendment does not preclude dismissal of a deputy city attorney "based solely upon his announced intention to run for Congress." Issue: Was the lower court in error for holding that the deputy city attorney served at the pleasure of an employer whose interests outweighed the attorney's First Amendment rights? (Certiorari denied. Newcomb v. Brennan, 46 LW 3310)

Issues: Does a regulation by the Newark Police Department which prohibits police officers from making derogatory comments about department orders or instructions violate freedom of speech rights? Does prohibition of either verbal or written censorship of colleagues for activity relating to official business violate the First Amendment? (Certiorari denied. Kerr v. Gasparinetti, 46 LW 3588)

Trade Regulation

Ruling below: The First Amendment is not a bar to a Federal Trade Commission order for corrective advertising by a manufacturer who deceptively advertises the benefits of its mouth wash for colds and sore throats. Issues: Are First Amendment rights violated by prohibiting advertising unless it contains a mandatory corrective message unrelated to the deception and presents as fact a view that is the subject of scientific controversy? (Certiorari denied. Warner-Lambert Co. v. FTC, 562 F2d 749, 46 LW 3475)

Issues: Does the Federal Trade Commission have authority to require as a condition necessary to advertisement and sale of a product that a disclosure about the product's effectiveness is "contrary to prior advertising"? Does the First Amendment prohibit the FTC from ordering corrective advertising? (Certiorari denied. FTC v. Warner-Lambert Co., 562 F2d, 46 LW 3606)

Landlord-Tenant

Ruling below: A lessor leased premises for use as a bookstore to a tenant who agreed in the lease not to use the premises for an unlawful purpose. The bookstore manager was convicted of offering obscene materials for sale on the leased premises. An equity court restored the premises to the landlord's possession. Issues: Must the equity court make its own determination as to the obscenity issue, or may it determine unlawful conduct by relying on an unrelated criminal proceeding to which the tenant was not a party? Does an equity court have jurisdiction to use the conviction of a clerk who allegedly sold obscene film and a criminal proceeding to which the bookstore owner was not a party in determining the violation of a lease agreement? (Certiorari denied. Crossroads Books, Inc., v. TOA Enterprises, Inc., 46 LW 3420)

Municipalities

Ruling below: An ordinance prohibiting any antenna of a prescribed height in residential zones is neither an impermissible restriction on free speech nor an arbitrary exercise of police power. Issues: If the ordinance is to regulate community aesthetics but impairs freedom of speech, must a "compelling state interest" be shown for the municipality to claim constitutional support for the ordinance? Is the First Amendment violated by an ordinance that provides no narrow and objective standards or guidelines for use when issuing or denying a permit for an antenna in excess of height limitations? (Appeal dismissed. Schroeder v. Municipal Court of Los Cerritos, 46 LW 3604)

Constitutional Law

Ruling below: The news-gathering right of a television reporter seeking to film executions for subsequent broadcast is not violated by a policy that permits news reporters access to executions in state prisons but bans audio or video recordings. There is no denial of equal protection because no cameras, television or otherwise, were allowed. Issues: May a television newsman constitutionally be barred because the state believes that a video rebroadcast would be offensive to the public? Is there a constitutional right for the public to know how public officials conduct executions? Does access for print coverage while excluding visual coverage violate the equal protection and expression rights of a television newsman? (Certiorari denied. Garrett v. Estelle, 556 F2d 1274, 46 LW 3483)

Schools

Issues: Does a high-school student have a protected right to publish and distribute a student newspaper that reports the results of a "confidential and non-obscene survey" canvassing sexual attitudes of his fellow students? May speculative fear by school officials that some students may experience anxiety when exposed to a nonobscene survey about sexual attitudes permit restraining publication of the survey even without exploring less-restrictive alternatives to protect the vulnerable? The lower court upheld the school board's refusal to permit distribution and publication of the survey, and the Supreme Court denied certiorari. (Trachtman v. Anker, 563 F2d 512, 46 LW 3531)

Issue: When a teacher expresses criticism about school practices to her principal rather than in a public forum, does she receive First Amendment

protection for her comments? The lower court held no and the Supreme Court denied certiorari. (Ginhan v. Western Line Consolidated School District, 555 F2d, 1309, 46 LW 3531)

Issue: "Did students at Kent State University have a First Amendment right to engage in peaceful political protest on campus notwithstanding the fact that there were disorderly assemblies on prior days?" The lower court held that a ban on student demonstrations did not violate the protestors' rights, and the Supreme Court denied certiorari. (Krause v. Rhodes, 46 LW 3542)

Pending

Libel

Ruling below: A television documentary producer was not required during a libel action to answer questions about his opinions and conclusions concerning persons interviewed, leads pursued, or material to be included in the public broadcast. Such answers, the court held, "would impermissibly chill the editorial process in violation of the First Amendment." Issues: Does nondisclosure of a libel defendant's state of mind interfere with the opportunity to establish actual malice based on reckless disregard for the truth, particularly when the plantiff has otherwise demonstrated the defendant-producer's subjective state of mind? Has the lower court removed all liability for malicious defamation where the liability occurs during an editorial process? (Certiorari granted. Herbert v. Lando, 46 LW 3574)

EMPIRICAL RESEARCH AND SOME MAJOR SUPREME COURT DECISIONS ON FREE PRESS/FAIR TRIAL CONFLICTS

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In deciding Nebraska Press Association et al. v. Stuart the Supreme Court overturned a judge's gag order related to what the judge had considered to be adverse pretrial publicity. Essentially Justice Burger's opinion for the unanimous court argued that adverse pretrial publicity does not necessarily and inevitably lead to an unfair trial. The thrust of the Court's decision was that while the impact of publicity was speculative, the impact of prior restraint of press freedom was not.[1] Consequently, the decision favored the benefits of press freedom over the dangers of adverse publicity. This area, where press freedom overlaps with the difficulties of judicial decision-making, has become known as the free-press/fair-trial controversy.

The free-press/fair-trial controversy is less a point of law and more a point of contention. This point is one of the few junctures of jurisprudence where conflicting areas of constitutionality have met with the explorations of empirical study. Basically the free-press/fair-trial controversy is a point of friction between constitutional claims of a free press under the First Amendment on one hand and claims for a fair trial under the Fifth, Sixth, and Fourteenth Amendments on the other.

The First Amendment has become a rallying point for the American news media, which insist that the right of freedom of speech must not be abridged in any way. Included among these rights is the right to communicate any and all forms of news concerning legal events.[2]

Opposing this position, the legal community, as embodied in judges and barristers, has argued that the Fifth Amendment, with its right to due process under the law; the Sixth Amendment, with its right to public trial by an impartial jury; and the Fourteenth Amendment, which is interpreted as extending the Bill of Rights to state cases, all provide that a defendant has the right to a fair and impartial trial.[3] The point of contention is whether a defendant can receive a fair trial under the intense scrutunity of media coverage.

Fundamental to this point of constitutional contention is the almost-irreconcilable difference in stylistic approach between the courts and the media. The courts, with their fundamental principle of law, operate as an incremental process. The process is deliberate. Great weight is given to the gradual accumulation of evidence and precedent so that the process results in a decision that, if not clear, is at least preponderant. Media, on the other hand, emphasize speed and flash. News is the fundamental principle of media, and news is sudden and ephemeral. News is not accumulated; it is displayed. It is not preponderant; it is available. It is not clear; it is quite simply there.[4] The conflict that arises from these points of view pits the eager expressiveness of the news media against the cautious deliberation of the legal system.

Despite differences in fundamental approaches, both the news media and the legal system have turned to yet another body of intellectual expression to map out their battleground. That other body is what has come to be loosely called empirical social science. Perhaps neither contender trusts this amalgamation of mathematical principle and human complexity, but both contenders seem willing to agree that solutions will not necessarily come from legal theory itself,[5] and that empirical approaches may yield suggestions if not solutions.

My purpose is to examine available empirical evidence related to the free-press/fair-trial controversy. This analysis will be centered around four major Supreme Court decisions which preceeded the Nebraska Press Association et al. v. Stuart decision: (1) Estes v. Texas; (2) Sheppard v. Maxwell; (3) Irwin v. Dowd; and (4) Dickinson v. U.S. These cases fit within a heuristic framework that can be used to group available empirical studies into conceptually useful categories.

The free-press/fair-trial controversy can be seen as pivoting around two simple distinctions: decorum versus content and behavior within the courtroom versus behavior outside the courtroom. By decorum I mean the general manner in which a given trial is comported: decorum can be conceived as ranging from dignified to uninhibited. By content I refer to the actual information related to any given trial, including both evidentiary and nonevidentiary information. Finally, I define the area within the courtroom as the physical area under the trial judge's immediate control. The area outside the courtroom is all physical spaces immediately adjacent to the courtroom, including the corridors that provide access to the courtroom.

These two sets of distinctions may be arranged in the following paradigm for the purpose of examining the free-press/fair-trial controversy: (1) decorum/inside courtroom; (2) decorum/outside courtroom; (3) content/inside courtroom; (4) content/outside courtroom. Note that this paradigm is heuristic and is not an attempt to exhaust all definitional possibilities.

Decorum/Inside Courtroom

Within the distinction between decorum and content the area of decorum appears to be the more-stable and clearly delineated distinction. Although the merits of a case are determined on the content of the trial, judicial experts are well aware that the decorum (the atmosphere in which the content is presented) may well have an impact on a given case. Accordingly trial judges are charged with maintaining an aura of calm in judicial proceedings. That maintenance begins with control of decorum within the courtroom.

Case

The area in which the free-press/fair-trial controversy spills over into considerations of decorum within courtrooms centers around equipment that can be used to provide trial coverage. What must be balanced in this area is the possibility of noisy and disruptive incursions related to media coverage against the serene atmosphere that is deemed indispensable for an impartial trial. In recent history this concern arose with the circuslike trial of Bruno Hauptmann in the 1930's and achieved an important distillation in Estes v. Texas.[6]

Estes v. Texas (1965),[7] among other contentions, argued that broadcasting trial proceedings over the defendant's objections contributed to the violation of the defendant's rights under the due-process clause of the Fourteenth Amendment. Speaking for the Court, Justice Clark held that while media coverage of a trial is an important function of a democratic society, its exercise is subject to maintaining absolute fairness in the trial procedure. Specifically Justice Clark stated that since print reporters could not bring in the distracting equipment of their trade--namely, typewriters and printing presses--so, too, the psychologically distracting equipment of broadcasting could not be used freely without disrupting the necessary air of serenity within the courtroom. Since the 5-4 decision was not clear-cut, the dissenting judges raised the point that a flat ban of broadcast coverage was not inherent in the decision but that the concept of an air of impartiality and serenity was viable under the Fourteenth Amendment. Although the decision left the status of broadcasting from the courtroom unclear, it did affirm the concepts of restraint and impartiality as necessary to the conduct of legally sound trials. The crux of the decision was that while mechanics are incidental, a trial's decorum is critical.

Studies

Support in this area comes largely from judicial temperament rather than systematic investigation. As judicial proceedings are a serious matter, judges have not been inclined to experiment extensively by allowing the inclusion of mechanical news media within their courtrooms. Despite tests of courtroom television in the states of Wisconsin, Texas, Colorado, Washington, Alabama, Florida, Georgia, Montana, Louisiana, and New Jersey,[8] prevailing sentiment appears to be the exclusion of mechanical news media until they prove not to be disruptive.

In a 1958 study of Illinois judges Cashman and Froke found that the judges had almost no objection to pencil-and-paper reporting in their courtrooms but that they generally objected to mechanical media within the courtrooms themselves, although they did not object to the same media in the corridors outside their courtrooms.[9] Even when separated in terms of whether the judges had or not been exposed to demonstrations or discussions about mechanical media in courtrooms, the judges were unchanged in their objections.

But while discussion and demonstration did not seem to alter the attitudes of judges toward mechanical media, experience with those media brought about changes in attitude. In 1958 Lawton studied three hundred attorneys and thirty judges in Oklahoma and found that the more exposure these two groups had with mechanical media in the courtroom, the more they tended to favor the presence of those media in the courtroom.[10] By and large, however, members of the judiciary have been reluctant to admit mechanical media into the courtroom.

Bryce W. Rucker studied general sentiments in this area by having purposive samples of journalists, legal professionals, and persons from the general population Q-sort sets of free-press/fair-trail statements. Based on the three groups, Rucker came to three conclusions (among others): (1) Within the study few people other than journalists strongly favored virtually limitless First Amendment rights for the press. (2) Only those persons related to the judicial area were unalterably opposed to televising trials. (3) Overall, more support was found for broadcasting trials than was expected.[11] In the absence of evidence to the contrary the sentiment of the legal community has been to exclude mechanical news media rather than risk disruption of judicial serenity.

Decorum/Outside Courtroom

The importance of serenity within the courtroom becomes especially salient to the legal community when the decorum inside the courtroom is threatened by more-generalized problems of decorum outside the courtroom. Of special importance are situations in which an undesirable decorum outside the courtroom spills over into the courtroom. Judges are not only charged with maintaining decorum within their courtrooms; they must also make sure that decorum outside their courtrooms does not disrupt the serenity and impartiality of judicial proceedings.

Case

One important case in which decorum outside the courtroom had an important impact on a trial procedure was Sheppard v. Maxwell (1966).[12] This case provided an important decision because it involved massive pretrial publicity and an atmosphere of prejudice and rancor related to news coverage that penetrated the courtroom.

In days preceeding the actual trial the news media presented sordid details from the defendant's life and editorialized in an inflammatory manner. During the trial the media questioned evidence, debated testimony, and generally conducted public deliberations on the trial and its outcome. All the jurors except one testified that they had been exposed to this fusillade before the

trial. Despite being sequestered in a motel during the trial, these jurors were in daily telephone contact with their families. In reaching a decision Justice Clark, speaking for the Court, concluded that the entire atmosphere of the trial had precluded the judicial serenity to which the defendant was entitled and cited the trial's carnival atmosphere among the reasons for remanding the case. The principle involved was quite simple: The prejudicial atmosphere generated by the exercise of First Amendment rights had interfered with the defendant's right to a fair trial. Media coverage had disrupted the trial's serenity.

Studies

The problem of decorum outside the courtroom does not appear to be a pervasive problem in the American judicial system. In a study of jury-trial coverage in two Midwestern dailies between 1966 and 1969 Eimermann and Simon found that, despite the fact that the seriousness of a given crime increased the likelihood that its associated trial would be covered, no significant difference was found among verdicts in trials that did or did not receive coverage.[13] The two scholars found no relation between verdicts and publicity overall.

Even the sheer volume of publicity did not have a noteworthy effect. In a study of a heavily but fairly covered murder case Sam G. Riley found little evidence of prejudgment by potential jurors except among those who had no courtroom experience or those who offered incorrect or fabricated facts about the case.[14]

In both studies, despite the presence of publicity that might lead to allegations of prejudice, the results did not indicate judgmental bias resulting from any kind of prevailing community atmosphere. The communities seemed able to absorb or discount media discussions of the trial topics. In the aggregate little outside impact of mass-media coverage was detected.

The results of these studies indicate that problems of decorum outside the courtroom are related to particular and isolated cases rather than to the general nature of media coverage of jury trials. In terms of decorum problems appear to relate to single particular trials rather than to trial coverage per se. In the long run problems of decorum generated by mass-media coverage seem soluble within the procedures that constitute the judicial system. As long as judges exercise discretion in maintaining the necessary air of serenity in judicial proceedings, problems of decorum appear soluble and of only minor importance.

Content/Inside Courtroom

In terms of the distinction between decorum and content, problems of content are more germane to general judicial procedure. Areas of content within the courtroom fall nearest to the rubric of the law of evidence. Detailed examination of the law of evidence is beyond the scope of this article. What is crucial, however, is the existence of a carefully defined set of rules relating to the submission, admissibility, and weight of evidence. These rules have been evolved by the legal community itself and are considered determinative in trial procedures.[15] That which is considered evidence is considered germane to the trial and becomes part of the public record. Responsibility for determining whether an item of information falls within the law of evidence is usually the responsibility of the trial judge. As a judicial decision must be rendered on the basis of admissable evidence, the trial judge often faces the problem of external (and irrelevant) evidence contaminating the procedure. When the media provide such external evidence, the free-press/fair-trial controversy becomes involved in content within the courtroom.

Case

An example of the difficulties attendant upon the emergence of external evidence in a trial occurred in Irwin v. Dowd (1961).[16] In this case a

parolee arrested on other charges had a confession to six murders attributed to him by a county prosecutor. Based on voir dire examinations, the defense challenged all the jurors on grounds of bias. Citing pretrial prejudice in this case, Justice Clark, speaking for the Court, enunciated the principle that jurors need not be totally ignorant of the facts and issues involved; they simply must be able to lay aside their preconceptions and render a verdict on evidence presented in court. The key concept related to matters of evidence reported outside of court was that these matters cannot be used in a decision unless they have first gone through the filtering process of evidentiary hearing.

Studies

The importance of controlling the use of evidence in rendering a verdict receives acceptable empirical support. In a simulated trial in the 1940s Weld and Danzig had jurors indicate belief in guilt or innocence at each stage of the trial. The researchers found that testimony did alter the jurors' certainty during the trial.[17] This finding was replicated (again with a mock jury) by Simon in 1966, when she found that trial experience reduced pretrial prejudice to minimal levels.[18] This result was also found in trial situations: The Chicago Jury Project in 1959 found that the judge and the jury agreed on the verdict 83 per cent of the time; the times when they disagreed, the judge often had information that was not available to the jury.[19] All in all, the content of what was presented to the jury in the courtroom had a significant impact upon trial outcome. Because of the importance of the evidence available to a jury, trial judges are required to insure that only relevant and admissible evidence is used by the jury in reaching its decision. By carefully controlling the admissibility within the courtroom, trial judges are able to minimize the impact of mass-media reporting on the substantial matters of a particular case.

Content/Outside Courtroom

An area in which a large number of free-press/fair-trial conflicts occur is content outside the courtroom. Since mass-media reports in this area may involve reporting of materials that are not germane to the trial at hand or materials that have not been filtered through the evidentiary process, problems of misused evidence can occur quite readily.

Case

In order to prevent the release of evidence that could prejudice jurors trial judges are able to issue a so-called gag rule[20] prohibiting publication of testimony given in open court. In Dickinson v. U.S. (1973), the Supreme Court upheld the power of a Louisiana District Court to formulate such orders. This decision thereby upheld contempt citations issued against two Baton Rouge reporters, but it did not address the issue of prior restraint of news media. The decision was made strictly on the ability of a court to issue such orders; it skirted the related constitutional question. The basis was more judicial mechanics than constitutionality. Concern was with preventing the prejudicing of potential jurors, not with questions related to First Amendment freedoms.

Studies

The problem of prejudicing potential jurors with news reports has been the subject of considerable study. In a finding replicated by Tans and Chaffee,[22] researchers Wilcox and McCombs noted that a prejudicial report of a confession was a significant factor in increasing a potential jury's belief in a defendant's guilt.[23] Another issue of content which affected mock-jury decisions was a prejudicial report of a defendant's prior record. Kline and Jess found that, in a mock trial, among four juries that had been exposed to messages about a defendant's prior record three recalled the information but did not use it. Perhaps more importantly, however, the fourth jury used

the information and reached a verdict contrary to the other three juries[24]--a minor but judicially undesirable deviation. Although only one group had used improper evidence, the deviation raised the ugly specter of potential jury bias, which the judicial system tries to exclude from all cases.

The possible impact of nonevidentiary information about confessions and prior records was not lost on the judiciary either: In a survey of 483 trial judges Siebert found most of the judges felt that the release of two kinds of information was inappropriate before the trial began: (1) the defendant's prior record and (2) any confession before it was accepted as evidence.[25] The judges' perceptions were supported in a series of simulated trials conducted by Padawer-Singer and Barton: Jurors were more likely to return guilty verdicts if they had been exposed to prejudicial news reports of a retracted confession and of the defendant's prior criminal record.[26]

Despite efforts at controlling evidence the possibility of contamination from mass-media reports emerged with a fair degree of strength in the research data. Both Sue, Smith, and Pedroza[27] and Sue, Smith, and Caldwell (reported in Gerbasi, Zuckerman, and Reis)[28] found that adverse pretrial publicity increased the likelihood of guilty verdicts, although research by Hoiberg and Stires[29] and Sohn[30] has indicated that the type of crime involved may be a contaminating factor. The implication of such data is that the release of prejudicial information about a defendant can prejudice jurors in such a way as to harm him. Based on the available evidence, prejudicial reports in the area of content raise the discomforting possibility of jury contamination despite judicial efforts to maintain a trial's impartiality.[31]

Assessment

Based on the empirical research that can be related to four major Supreme Court decisions in the free-press/fair-trial area, available information indicates that (1) mechanical news media will continue to be excluded from trial procedures until these media can demonstrate that they will not disrupt judicial serenity; (2) problems of decorum can be minimized if trial judges conduct their courtrooms in a manner conducive to judicial serenity; (3) the law of evidence can be used to assure that the defendant will be tried only on evidence relevant to the case on hand except (4) when prejudicial reports of a confession or a prior criminal record are made before the trial.

The last exception provided the ground upon which Nebraska Press Association et al. v. Stuart was determined. In this case the trial judge opted for restraint on the press because of the danger of prejudicial reporting. In rendering a decision on the matter Justice Burger, speaking for the Court, noted that while pretrial publicity can do injury, such potential injury has not been demonstrated with a degree of certainty necessary to justify restraint.[32] In effect Justice Burger noted that while empirical support exists for showing the possibility of the dangers of pretrial publicity, the existing and available materials by no means demonstrate the certainty of that danger. The possibility of prejudice remains, but demonstration of such prejudice does not.

Existing social-science research has inadvertently supported major Supreme Court decisions in the free-press/fair-trial area. By being unable to demonstrate that mechanical news media will not disrupt judicial serenity, emphirical research affirms the exclusion of mechanical news media from the courtroom. By being unable to demonstrate that adverse pretrial publicity will bias a potential jury, empirical research cannot support the use of gag orders by concerned members of the judiciary. In effect, empirical social science finds itself supporting judicial principles not by its presence but by its absence.

The impact of Nebraska Press Association et al. v. Stuart was to underscore the inadequacy of existing social-science research in the free-press/fair-trial area. In terms of issues related to decorum this research has not yet demonstrated that news media can be given full access to judicial pro-

ceedings without disrupting the serenity of those proceedings. In terms of issues related to content this research has not yet demonstrated that pretrial publicity can have an adverse effect on the outcome of a trial. The result is a reaffirmation of the status quo: Mechanically the news media cannot be given full access to the courtroom because they have not proved their worth; conceptually news media can be given full access to the courtroom because they cannot be proved to be harmful. The result is a paradox: News media cannot be given full access because they are disruptive; news media cannot be denied access because they are indispensable. The task of empirical social-science research in the future is to determine whether or not both, one, or neither of these points-of-view is appropriate.

Endnotes

[1]Nebraska Press Association et al. v. Stuart, 96 S. Ct. 2791 (1976).

[2]Francis L. Dale, "First and Sixth Amendments: Can They Co-Exist?" in Selected Readings: Fair Trial--Free Press, ed. Glenn R. Winters (Chicago: American Judicature Society, 1971), p. 14.

[3]Dale, pp. 11-12.

[4]David L. Grey, The Supreme Court and the News Media (Evanston, Illinois: Northwestern University Press, 1968), p. 48.

[5]Donald M. Gillmor, Free Press and Fair Trial (Washington, D.C.: Public Affairs Press, 1966), p. 199.

[6]Alfred Friendly and Ronald L. Goldfarb, Crime and Publicity (New York: Twentieth Century Fund, 1967), pp. 211-215.

[7]Estes v. State of Texas, 85 S. Ct. 1628 (1965).

[8]James L. Hoyt, "Cameras in the Courtroom: Another Chance," Public Telecommunications Review, 6 (May/June, 1978), 28-34; James L. Hoyt, "Courtroom Coverage: The Effects of Being Televised," Journal of Broadcasting, 21 (Fall, 1977), p. 489.

[9]Gerald Cashman and Marlowe Froke, "Canon 35 as Viewed by the Illinois Judiciary," in Free and Fair: Courtroom Access and the Fairness Doctrine," ed. John M. Kittross and Kenneth Harwood (Philadelphia, Pennsylvania: Association for Professional Broadcasting Education, 1970), pp. 31-32.

[10]Sherman P. Lawton, "The Retreat of Canon 35 . . . Some Places," in Free and Fair: Courtroom Access and the Fairness Doctrine, ed. John M. Kittross and Kenneth Harwood (Philadelphia, Pennsylvania: Association for Professional Broadcasting Education, 1970), p. 41.

[11]Bryce W. Rucker, "What Solutions Do People Endorse in Free Press--Fair Trial Dilemma?" Journalism Quarterly, 44 (Summer, 1967), 240-244.

[12]Sheppard v. Maxwell, 86 S. Ct. 1507 (1966).

[13]Thomas E. Eimermann and Rita James Simon, "Newspaper Coverage of Crimes and Trials: Another Empirical Look at the Free Press-Fair Trial Controversy," Journalism Quarterly, 47 (Spring, 1970), 143-144.

[14]Sam G. Riley, "Pretrial Publicity: A Field Study," Journalism Quarterly, 50 (Spring, 1973), 21-22.

[15]"Law of Evidence," Black's Law Dictionary, ed. Henry Campbell Black, Revised Fourth Edition (St. Paul, Minnesota: West Publishing Company, 1968), p. 658.

[16]Irwin v. Dowd, 81 S. Ct. 1639 (1961).

[17]Free Press and Fair Trial, pp. 201-202.

[18]Walter Wilcox, "The Press, the Jury, and the Behavioral Sciences," Free Press and Fair Trial: Some Dimensions of the Problem, ed. Chilton R. Bush (Athens, Georgia: University of Georgia Press, 1970), p. 65.

[19]Crime and Publicity, p. 92.

[20]Donald M. Gillmor and Jerome A. Barron, Mass Communication Law; Cases and Comment, Second Edition (St. Paul, Minnesota: West Publishing Company, 1974), p. 428.

[21]Dickinson v. United States, cert. den. 94 S. Ct. 170 (1973).

[22]Mary Dee Tans and Steven H. Chaffee, "Pretrial Publicity and Juror Prejudice," Journalism Quarterly, 43 (Winter, 1966), 651.

[23]Walter Wilcox and Maxwell McCombs, "Confession Induces Belief in Guilt: Criminal Record and Evidence Do Not," ANPA New Research Bulletin, 15 (July 7, 1966), 46.

[24]F. Gerald Kline and Paul H. Jess, "Prejudicial Publicity: Its Effect on Law School Mock Juries," Journalism Quarterly, 43 (Spring, 1966), 114.

[25]Fred S. Siebert, "Trial Judges' Opinions on Prejudicial Publicity," in Free Press and Fair Trial: Some Dimensions of the Problem, ed. Chilton R. Bush (Athens, Georgia: University of Georgia Press, 1970), p. 22.

[26]Alice M. Padawer-Singer and Allen H. Barton, "The Impact of Pre-Trial Publicity on Jurors' Verdicts," in The Jury System in America, ed. Rita James Simon (Beverly Hills, California: Sage Publications, 1975), 131; 134-135.

[27]Stanley Sue, Ronald E. Smith, and George Pedroza, "Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors," Psychological Reports, 37 (December, 1975), 1300-1302.

[28]Kathleen Carrese Gerbasi, Miron Zuckerman, and Harry T. Reis, "Justice Needs a New Blindfold: A Review of Mock Jury Research," Psychological Bulletin, 84 (March, 1977), p. 335.

[29]Bruce C. Hoiberg and Lloyd K. Stires, "The Effect of Several Types of Pre-Trial Publicity on Guilt Attributions of Simulated Jurors," Journal of Applied Psychology, 3 (July-September, 1973), p. 271.

[30]Ardyth Broadrick Sohn, "Determining Guilt or Innocence of Accused from Pretrial News Stories," Journalism Quarterly, 53 (Spring, 1976), p. 105.

[31]Marv M. Connors, "Prejudicial Publicity: An Assessment," Journalism Monographs, 41 (September, 1975), 25.

[32]Nebraska Press Association et al. v. Stuart, 96 S. Ct. 2791 (1976).

SOME PSYCHOLOGICAL DIMENSIONS OF FREE SPEECH ATTITUDES

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Some previous research reported in the Free Speech Yearbook concluded that problems of censorship are as old as recorded history and that although the United States is one of the freer nations on earth, it needs to be wary of well-intended but misguided attempts at censorship by the militant majority.[1] Other researchers summarizing surveys of attitudes toward free speech reported that antidemocratic attitudes are the norm rather than the exception and that attitudes opposing freedom had grown more restrictive during the time they had been monitored.[2]

Many are likely to believe that the activism in the latter part of the Viet Nam War evidenced a swing toward permissiveness in expression. However, at the same time that the Nixon administration was engaged in illegal intrusions into privacy and an unprecedented use of grand juries to intimidate opposition,[3] the opposition was engaged in extralegal attempts to restrain expression of persons who favored American involvement in the war. The late Hubert Humphrey, who served as Lyndon Johnson's Vice-President during a major escalation of the war, was shouted down and was unable to speak on several university campuses, as were other supporters of American foreign policy during that period. Clearly Humphrey's opinion was unpopular at that time. Many well-meaning persons felt perfectly justified in restraining it because, in their opinion, he was wrong, and they were right, and they had the might to silence the opposition.

Even more recently, police seized files from the Stanford Daily, looking for evidence of a possible crime. The courts upheld the seizure. In a U. S. Court of Appeals decision Judge Malcolm R. Wilkey rejected journalists' requests that the telephone company be required to notify them before acceding to government subpoenas for long-distance-call records.[4]

In Skokie, Illinois, American Nazis required American Civil Liberties Union efforts in court and police protection in order to hold a parade. It is likely that the event drew more spectators because of the attempts at suppression than if the request for a demonstration had been routinely allowed. The parade was transformed from a mere curiosity to an important issue with all the attendant publicity and onlookers. (See the opening article in this volume. -- Ed.)

Francis Biddle has said that American history could be characterized in terms of underlying attitudes concerning freedom of speech.[5] The Viet Nam War activism, privacy of records, and marching of American Nazis are merely focal points that seem to demonstrate that, regardless of the issue, both liberals and conservatives are more willing to restrain the freedom of expression of the opposition than to allow that expression and to engage in discourse on the issues.

In an effort to gain more empirical data on persons who would allow freedom of expression for others and those who would restrain it, several investigations have been conducted at the University of Denver over the past decade. Many of the investigations have been aimed at identifying the psychological characteristics of persons whose attitudes toward freedom of speech could be described as permissive or restrictive. A description of that research is the purpose of this article.

The research began in 1968 with the creation of an instrument that

allowed for the assessment of free-speech attitudes.[6] All the items in the instrument were drawn from court cases in which the U. S. Supreme Court had already decided what was allowable. Four topical areas were tapped: (1) threats against the federal government, (2) provocation and preserving the peace, (3) artistic expression and public morality, and (4) association, disclosure, and disclaimer. The instrument was validated, using the methods of two known groups: the Board of Directors of the Colorado Chapter of the American Civil Liberties Union and the Board of Directors of the Denver-based Citizens for Decent Literature. Only those items were retained which polarized the two groups. Temporal reliability or stability over time was arrived at with a test-retest procedure with a two-week interim. Overall reliability was established at .93. Two panels of expert judges were utilized to refine the instrument with reference to the attitude-construct validity and the legal validity of the items. Later research added concurrent validity. The response mode was the Likert scale.

Free speech was thought to be public expression that the Supreme Court said was allowable. A subject who agreed with an item that stated the issue behind a Supreme Court decision was, in essence, agreeing with the Supreme Court and deciding in favor of something that by definition was "free speech." A subject who disagreed with an item disagreed with a Supreme Court decision and decided against something that by definition was "free speech."

Many civil libertarians would claim that the Supreme Court has decided improperly in many instances. They feel that the Court's definition of what is allowable is not free enough. However, no attempt was made to second-guess the Court and to decide independently what was free or not free and based on some religious, political, or philosophical ideology. Permissives were those who generally decided in favor of some expressions being allowed; restrictives were those who were generally opposed.

Originally masking items were utilized but were later discarded. It appeared that the items dealt with such a variety of issues that they masked one another. Originally, also, there was an affective component of attitudes and was later dropped.

Initial findings, utilizing the instrument with a sample of a population of high-school students, were that even though the students said they "believed in" (supported, endorsed) freedom of speech, they were in fact opposed to free expression in all four of the topical areas tapped and on nearly every item. The affective items were consistent with the cognitive items but indicated even stronger responses in opposition to freedom. It appeared that restrictives were opposed to freedom of expression for out groups and deviants and were reliant on authority.

Goding[7] followed up this research and tested these assumptions. He was interested in the psychological dimensions of power and hostility and how they were associated with free-speech attitudes. He used the Free Speech Attitudes Scale discussed previously and also the Buss and Durkee Hostility and Guilt Inventory,[8] Haiman's Revised Openmindedness Scale,[9] and Dean's Powerlessness Scale.[10] Goding tested a population of seventy-five. He discovered that power and hostility are both significantly associated with freedom-of-speech attitudes. Feelings of powerlessness are linked to opposition to freedom, and hostility is associated with opposition to freedom.

Means[11] set out to test a hypothesized association between anxiety-proneness and free-speech attitudes. Anxiety-proneness was regarded as a psychological construct that has extensive implications for a wide range of mental and emotional functions. Previous research indicated that anxiety was related to totalitarian attitudes. Means used the Free Speech Attitudes Scale and Cattell's I.P.A.T. Anxiety Scale.[12] He determined that subjects scoring high in anxiety-proneness were significantly more restrictive in their attitudes about free speech than persons in the low-anxiety group, and persons in the low-anxiety group were significantly more permissive.

Collett[13] was concerned with whether a person's value system might be an important determinant of free-speech-attitude orientation. She hypothesized different value patterns for permissives than for restrictives. She compared the value rankings for two groups using the Free Speech Attitudes Scale and the Rokeach Value Survey[14] and found that permissives and restrictives exhibit different value patterns. In terminal values both groups rank "freedom" high (which suggests that freedom "means" something different to the two groups). But restrictives emphasized "national security" while permissives chose "equality" and " a world at peace." In instrumental values restrictives chose being "obedient" and "self-controlled," while permissives selected being "independent," "broadminded," and "forgiving."

Johnson[15] attempted to test the relationship between free-speech attitudes and various personality characteristics. He used the Free Speech Attitude Scale along with the Social Attitude Inventory,[16] the D Scale, Form E,[17] and the California F Scale.[18] These instruments were administered to a stratified random sample of classes totaling 567 subjects at Community College of Denver.

He determined that permissives were significantly more liberal, less dogmatic, and less authoritarian than restrictives. Permissives were also "more willing to change the status quo" than were restrictives. Johnson believed that these personality indicators could serve as predictors of free-speech attitudes in future investigations.

In an investigation relevant to this discussion of free-speech attitudes Lewis[19] sought to explore the ways in which people react to obscene words. He described types and intensities of obscenities in a variety of circumstances. Data were gathered from two hundred Denver metropolitan-area residents using stratified, cluster, and interval sampling methods to select informants. A standardized interview schedule was pretested and used to collect the information.

Lewis determined that obscenities in four different "roles" evoked different responses. (Roles were "Sexuality," "Aggression," "Rebellion," and "Institutional Perpetuation.") Results indicated that responses to obscenity were related to the individual's attitudes toward sex and the individual's religious beliefs. The role (in which obscenity was used) which evoked the strongest negative reactions was that of rebellion. This result may have been a function of the time in which the study was conducted (1970).

Attitudes are customarily thought of as a mediating or intervening variable. The reason that researchers know that an attitude exists is that the respondents to an attitude object (usually topical and in the public domain) tend to organize themselves. Thus attitudes are defined as a syndrome of response consistency in reference to an attitude object.[20] Attitudes are also usually thought of as sociologically significant because when researchers tap the attitudes toward some attitude object, they usually intend to tell us about the attitudes of a group of people.

Because of the number of studies done which connect free-speech attitudes with some psychological variable we are beginning to get what amounts to a psychological profile of permissives and restrictives. Knowing a person's attitude, we can begin to describe the kind of person he is likely to be. Knowing a person's personality characteristics, we can begin to predict what that person's attitudes will be. Assuming that a censor is likely to be restrictive, we can predict that a censor will claim to be in agreement with freedom of speech but will be opposed to what the Supreme Court says is legal in four major topical areas.

A censor is likely to rely more on authority and be more hostile toward deviants. He is also likely to have feelings of powerlessness. A censor will have a characteristic trait that inclines him/her toward anxiety and is likely to be anxious most of the time about nothing in particular. A censor will value national security as highly as self-control and obedience.

A censor will be more politically conservative, more dogmatic, more authoritarian, and less willing to change the status quo. It is not an encouraging profile, certainly not one that encourages dialogue or interaction. But, knowing the profile, understanding the make-up of a censor may make it possible for permissives to come up with other resources for coping with or confronting him/her.

Possibly permissiveness or restrictiveness is itself a personality variable, which is manifested with reference to free speech and several other attitude objects. In any case, the studies lead in the direction of the establishment of the psychological significance of this attitude. Samples have been limited, but the results are convincing. Some research could replicate earlier research to test the results. Additional research could fill the empty spaces, providing us with a strong empirical base for subsequent theory building in free-speech scholarship. Perhaps, at that time we will begin to understand why people are so polarized on an issue that is so crucial to individual and national liberty and why they are so willing to silence their opposition.

Endnotes

[1]Alton Barbour, "Survey of Free Speech in the Western World," Free Speech Yearbook, 1968, pp. 1-6. (See also Alton Barbour, "Gags, Blindfolds, and Figleaves," University of Denver Magazine, Vol. 7, No. 4, Winter/Spring, 1970, pp. 14-19.)

[2]Alton Barbour and Alvin Goldberg, "Survey Research in Free Speech Attitudes," Free Speech Yearbook, 1971, pp. 28-35.

[3]David Eshelman, "Compulsory Disclosure of News Sources: A Critical Investigation," doctoral dissertation, University of Denver, 1973.

[4]Charles Seib, "Another Judicial Jab at the Press," The Denver Post, Sept. 25, 1978, p. 20.

[5]Francis Biddle, The Fear of Freedom (Garden City, N.Y.: Doubleday, 1951).

[6]Barbour and Goldberg, 1971, supra.

[7]William Goding, "The Power and Hostility Dimensions of Free Speech Attitudes," doctoral dissertation, University of Denver, 1969.

[8]A. H. Buss, The Psychology of Aggression (New York: Wiley, 1961).

[9]Franklyn Haiman, "A Revised Scale for the Measurement of Open-Mindedness," Speech Monographs, 31 (1964), pp. 97-102.

[10]D. G. Dean, "Alienation: Its Meaning and Measurement," American Sociological Review, 26 (1961), pp. 753-58.

[11]James Means, "An Empirical Study of the Relationship Between Anxiety-Proneness and Free Speech Attitudes," doctoral dissertation, University of Denver, 1971.

[12]R. B. Cattell and I. H. Scheier, Handbook for the IPAT Anxiety Scale Questionnaire (Champaign, Ill.: Institute for Personality and Ability Testing, 1963).

[13]Patricia Collett, "Value Dimensions of Free Speech Attitudes," doctoral dissertation, University of Denver, 1972.

[14]Milton Rokeach, "The Measurement of Values and Value Systems," in G. Abcarian (ed.), Political Participation and Social Psychological Processes

(Columbus, Ohio: Merrill, 1971).

[15]Emory Johnson, "An Empirical Study of Relevant Personality Characteristics and Attitudinal Dimensions as Predictors of Free Speech Attitudes," doctoral dissertation, University of Denver, 1972.

[16]H. J. Eysenck, "The Psychology of Politics and the Personality Similarities Between Fascists and Communists," Psychological Bulletin, 53 (1956), pp. 177-182.

[17]Milton Rokeach, The Open and Closed Mind (New York: Basic Books, 1960).

[18]T. W. Adorno, E. Frenkel-Brunswik, D. J. Levinson, and R. S. Sanford, The Authoritarian Personality (New York: Harper and Row, 1950).

[19]James Lewis, "Reaction to the Concept of Obscenity: Description and Explanation," doctoral dissertation, University of Denver, 1970.

[20]Alton Barbour, "Attitude: Survey, Summary, and Synthesis," Journal of the Colorado-Wyoming Academy of Science, Oct., 1970.

THE FCC: THE URGE TO CENSOR

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Every society that attains a level of development deemed to be civilized has felt with varying degrees of rigor and certainty that there exists a need to protect the morals of the public: to censor. From the ancient Greeks (Plato suggested censoring The Odyssey) through the book burning of the Nazis and on to the recent refusal of the Louisiana state legislature to end that state's distinction of being the only one to prohibit sex education in the public schools, each "civilized" society has also had those who feel that they must expose themselves to the sources of corruption in the interest of protecting the public good. Despite the First Amendment and our free-speech traditions American society is no different. Although much of the history of censorship involves the suppression or attempted suppression of material deemed dangerous to the state or church, the modern censor seems obsessed with sex.[1]

Our Bill of Rights established the freedoms of speech and press, but without definitions, as our first guaranteed individual rights. However, there exist in our common-law heritage categories of speech that are not deemed worthy of First Amendment protection. Among the unprotected areas are those defined by Section 1464, Title 18, U. S. Code, which stipulates that "Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisioned not more than two years, or both."[2]

For years broadcasters and regulators have been feuding over the issue of the First Amendment and Section 1464. The matter is further complicated by the legal recognition that broadcasting has a special relationship to the First Amendment and the wording of Section 326 of the Communications Act of 1934: "Nothing in the chapter shall be understood or construed to give the Commission power of censorship over the radio communication or signals transmitted by any radio station, and no regulation shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."[3]

The justification for a special relationship between the First Amendment and broadcasting rests on (1) the concept that the airwaves are a natural/national resource, (2) the limited capacity of the airwaves, and (3) the idea, often stated by the Federal Communications Commission and reiterated by the Supreme Court, that broadcasting is a pervasive medium, which can easily force itself upon unwilling audiences.[4] In these respects broadcasting is seen as substantially different from other media: therefore, other forms of regulation are appropriate.

Section 1464, Title 18, U. S. Code, is incorporated in the Federal Communications Act of 1934. Thus, the Federal Communications Commission is given the peculiar charge of preventing the "uttering" of obscene, indecent, and profane material without violating the censorship provision of Section 326.

Fortunately, from the commission's point of view, the courts provided a definition of broadcast censorship in 1931, early in the history of federal regulation. The case involved the famous goat-gland physician: Dr. John R. Brinkley and his radio station, KFKB, Milford, Kansas. Brinkley was denied a renewal for his license. The Federal Radio Commission, precursor of the Federal Communications Commission, determined that Brinkley's using of the airwaves to promote his cures was not in the public interest and that the continued operation of KFKB was not justified. Brinkley retorted that this was

censorship. The commission's finding was upheld in court, and from this litigation the finding was made that censorship in terms of broadcasting meant scrutinizing a program prior to its release.[5] Brinkley had not been so scrutinized, so he ceased being an American broadcaster.

Although we can state what censorship is, defining obscenity and profanity borders on the impossible. To Anthony Comstock, author of the Comstock Act of 1873, obscenity included everything from nudity to birth-control information.[6] Former Supreme Court Justice William O. Douglas refused to recognize obscenity in a legal sense, feeling that one man's pornography might very well be another man's art.[7] The federal judiciary seems to have an easier time determining what obscenity is not (nudity, for instance) than in deciding what it is. Whatever obscenity is, it has been declared to be outside the scope of the First Amendment and not a form of protected free speech.

The Supreme Court began to send clear signals, in the cases of Perez v. Ledesmer, Dyson v. Stein, and Byrne v. Karelekis,[8] that it would prefer to leave the matter of obscenity in the hands of state prosecutors while re-emphasizing the viewpoint taken in Roth v. U.S.[9] that obscenity could be defined and prohibited. Toward the end of its 1973 term the Supreme Court reworked its definition of obscenity, indicating that within the guidelines of appealing to prurient interests, depicting sex in a patently offensive way, and lacking in serious artistic, literary, or scientific value, local communities could determine for themselves what is and is not obscene. This decision, in Miller v. California,[10] has not succeeded in shifting the arena for obscenity litigation from the federal courts to the state courts, nor has it provided any great relief to the problems of the FCC, because the regulation of broadcasting is in the federal domain. The Federal Communications Commission retains its basic function of regulating the unique media we call broadcasting and of prohibiting obscenity, while not violating Section 326.

While Section 326 of the Communications Act is seen as a censorship prohibition, it can be regarded as more than a mere ban on the scrutinizing of a program before it is broadcast. If the commission considers that something broadcast is obscene under Section 1464, does Section 326 prohibit it from taking action? If the answer is yes, Section 326 must be construed to mean that the commission cannot interfere with radio communication before, during, and after transmission. This would then leave Section 1464 as a reminder to broadcasters that there are limits on what they can say, but the wording of Section 1464 would be applicable to commission activity only at renewal time. If there were violations of Section 1464 which demanded attention, the inclusion of Section 1464 in the criminal code would allow prosecution by the Justice Department without interfering in the regulatory responsibility of the FCC. Since the courts retain the view that obscenity exists and needs to be dealt with, a statute covering broadcasting would remain, but the FCC would be unable to function as a censorship board.

The FCC and Attempts to Enforce Section 1464

The commission has consistently denied wanting to censor, but it has never denied wanting to prevent the broadcasting of indecent material as not in the public interest. But the Virginia Law Review feels that "for the commission to ban otherwise constitutionally protected speech simply because the commission has decided that the public, for its own good, should not hear the material seems to fall squarely within the statutes [326] prohibition."[11]

Case law has established that considering obscenity in license renewal and denials by the FCC is not censoring. But some commissioners feel that the FCC is overstepping its authority in this area. Former Commissioner Nicholas Johnson, after dissenting that the WGLD case (which will be discussed later) said, "While I do not condone programming such as that before us, I am nevertheless extremely reluctant to use my power as a federal official to impose my tastes on anyone, let alone upon an entire nation."[12]

Also commenting on the WGLD case in 1973 was Michael Gartner, of the

Wall Street Journal. He noted that the meaning of Section 1464 had not been clearly defined by the Supreme Court and could not therefore be used as an exception to the First Amendment rights of broadcasters. Gartner also stated that since "indecency" is even harder to define than obscenity and has never been determined to be outside the scope of the First Amendment, the actions of the FCC constituted a clear case of censorship.[13]

Neither Section 1464, Title 18, nor the forfeiture provisions of the Federal Communications Act of 1934 clearly state who is the primary enforcer of the obscenity ban. Since 1464 is contained in the criminal code, the role of the Justice Department is clear: it may bring action against violators. The commission seems to feel that it has concurrent powers in this area. The FCC has levied fines under Section 503 (b) (1), Title 47, U.S. Code, and used its cease-and-desist and revocation power in regard to Section 1464.

Section 503 (b) (1)[14] prescribes the method that the FCC must follow to assess a forfeiture (fine) against a broadcast licensee. A written notice of liability must detail the charges and provide the broadcaster with an opportunity to reply. If the commission is not satisfied with the reply, the fine must be paid. If the fine is not paid, the FCC must rely upon the Justice Department to enforce its order. Although the FCC may revoke a license, it cannot enforce any lesser penalties. It must depend on the Justice Department.

The FCC apparently feels that it has a clear mandate to determine when a violation of Section 1464 has occurred. It interprets Section 508 (b) (1) (e) of the Communications Act to mean that it has concurrent power with the Justice Department to punish acts of broadcast obscenity. Others interpret this section to mean that the FCC can take action only after the Justice Department has determined that an actionable offense has occurred. The placing of Section 1464 in the criminal code also suggests that the FCC does not have the power to determine when obscenity has been broadcast nor to take action.

Entering the 1970s, the commission found itself dissatisfied with the confusion of overlapping authority and the process of calling upon the Justice Department to investigate and initiate action against obscenity on the airwaves. It began to act on its own. Even the lack of solid court backing did not prevent it from closely watching broadcasters and warning them of possible FCC action if they made obscene or indecent broadcasts.

In 1970 former FCC Chairman Dean Burch said that the commission did not need court-provided guidelines to determine what was legally obscene. He noted that the precedent already existed for denying a renewal of a license for broadcasting smut during a substantial part of the day. Burch said that the commission could deny licenses on the grounds that "Such programming is patently offensive by contemporary community standards and does not serve the needs and interests of the area."[15] Burch was referring to the 1962 license-renewal denial for WDKD, Kingstree, South Carolina,[16] on the ground that one of its on-air personalities was consistently coarse, vulgar, and indecent. Although this was a major reason cited by FCC for denying renewal, one of the station owners had misrepresented several facts concerning the case to the commission. Misrepresentation is the ultimate sin that a broadcaster can commit. The heavily documented charge of misrepresentation makes WDKD a poor precedent for obscenity rulings.

Speaking before the National Association of Broadcasters in 1973, Chairman Burch again threatened action by the commission if broadcasters failed to act in the public interest in removing obscene and indecent matter from their stations. Despite Burch's contention that the power of the FCC in this area is clear, others urged the commission to seek a test case.

Among those who called upon the FCC to gain judicial support for its efforts to regulate obscenity was the then-chairman of the Senate Communications Subcommittee: John Pastore of Rhode Island.[17] Pastore was backed by Commissioner Robert Wells, who said that the First Amendment did not allow broadcasters to bring smut into the American home but added that the commission

needed a test case to clarify its authority and enable it to act effectively.

A review of FCC efforts to regulate broadcast obscenity provided support for those who felt that a test case was needed. As already noted, the WGLD decision had the solid backing of misrepresentation charges. Thus, even if an appeals court had determined that the FCC's statements on program content were impermissible censorship, the license would undoubtably have been lost anyway.

The commission handed itself a setback in 1964 in ruling on renewals for several stations licensed to the Pacifica Foundation.[18] After studying a series of complaints received over a period of five years, during which programs dealing with topics such as homosexuality and birth control and including profane language were broadcast. The commission ruled that to deny the licenses would limit programming to that which was "inoffensive" and "bland."[19] Pacifica had its licenses renewed, but the inquiry caused them and other broadcasters to be more careful. The case was never appealed because there was no reason to do so. However, the broadcasters did tone down programs dealing with controversial topics for fear that a court case won by the FCC would give it the undisputed right to enforce Section 1464 in accordance with the commission's own determination of what constitutes the public interest.

With the new and more conservative Nixon Administration in office the FCC stepped up its efforts to regulate obscenity. In 1970 it imposed a fine upon WUHY,[20] a noncommercial FM station owned by Eastern Education Radio. The station aired a taped interview with Jerry Garcia, leader of a rock group known as "The Grateful Dead." Garcia's language was gratuitous in his use of four-letter words and other expletives. The FCC ruled that while Garcia's language was neither obscene nor appealing to prurient interests, it was "indecent" and that the use of such language could be avoided without affecting the message content.[21]

In the WUHY case the FCC made the significant determination that there was a difference between "indecency" and "obscenity" and that the former could also be identified and proscribed from the airwaves. The declaration that at least two categories of inappropriate speech were defined and prohibited by Section 1464 was not challenged by WUHY, the station being content to pay the small fine imposed by the FCC. Hence, the commission's search for a test case would have to be pursued further.

Having failed in the WUHY case, the FCC tried again. In 1973 it made a ruling on programs broadcast on WGLD-FM, Oak Park, Illinois, a station owned by Sonderling Broadcasting.[22] The station aired two programs in February, 1973, entitled "Femme Forum." These shows included discussions of oral sex and other explicit matters. In ruling the programs to be violations of Section 1464 the commission used the Roth test, declaring that the programs were patently offensive, designed to appeal to prurient interests, and without redeeming social value. The fine assesed for what has become known as "topless radio" was two thousand dollars.

While ruling that WGLD's programs were patently offensive, the commission failed to indicate by whose standards this determination was made. It stated that the actual content in these programs, not just the manner of presentation, was obscene. Commissioner Nicholas Johnson disagreed, citing Chicago newspapers that called the programs boring. Johnson felt that the FCC had chosen, not material that was titillating, but matter that was bland to test its rules on obscenity.

However, when all was said and done, the legal issue remained unresolved; for Sonderling Broadcasting chose not to appeal the case. Ernest Sonderling, owner of the corporation, expressed his unhappiness with the decision, holding that it was censorship, but also said of the decision: "as a practical broadcaster, I abide by it."[23] To Sonderling a practical broadcaster is apparently one who closely watches the balance sheet and sees nothing to be gained through protracted legal battles.

There were others, though, who were willing to fight this ruling. The Illinois Citizens Committee for Broadcasting and the Illinois Division of the American Civil Liberties Union unsuccessfully petitioned the District of Columbia Court of Appeals for a hearing of the case.[24] The court expressed its reluctance to interfere with the FCC's decision, given the likelihood that children might have access to such broadcasts. This was some measure of support for the FCC; but the two Illinois groups were only interested parties, not the actual party against whom penalities had been assessed. So the question of strict administration of Supreme Court obscenity guidelines was not raised. Still, the commission had asserted its power, this time against a commercial broadcaster, and had met scant resistance.

WBAI: The Test Case

The commission finally found what may come to be considered an obscenity test case in 1973. The station involved was WBAI, the Pacifica Foundation's New York outlet. WBAI played a recording of George Carlin's "Occupation Foole." In this now-famous recording Carlin used seven four-letter words to describe sexual and excretory functions.[25] The commission received a complaint from a listener whose minor child had beard the broadcast. This the FCC felt might be its vehicle for banning obscenity and indecency.

In their decision on the "seven dirty words" in 1975[26] a majority of the commissioners ruled, in a finding they held to be "narrow," that the words were indecent and could not be broadcast during times when children might constitute part of the audience. The commission once again asserted that there was a differene between obscenity and indecency in the meaning of Section 1464 and that the FCC was all that stood between the public and a massive outpouring of filth.

The Pacifica Foundation, with the support of the National Association of Broadcasters and others, challenged the ruling before the Circuit Court of Appeals. Pacifica succeeded in obtaining a reversal of the FCC's decision, which, if upheld on appeal to the Supreme Court, had the potential of severely limiting the authority of the commission. The court made the following points in its 2-1 judgement:

1. The FCC order was overboard and vague, for it provided no definitions and prohibited broadcasting the words whenever children might be listening.

2. The use of the words was banned by the FCC regardless of the context.

3. In banning "indecent" speech the FCC created a new category of constitutionally unprotected expression which the courts have not previously recognized.[27]

The part of the ruling which could have had the greatest impact on regulatory practices did not refer to the use of specific words but only to the rejection of the FCC's often-stated contention that the alternative to commission action would be the flooding of the airwaves with filth. The argument of broadcasters has been that the influence of the audience and advertisers serves as a check on those licensees who might be inclined to be gratuitous in their language and programming. In the majority opinion Justice Tamm appeared to be accepting this contention by stating:

> Licenses are businesses and depend on advertising revenues for survival. The corporate profit motive and the connection between advertising revenue and audience size suggest that the dike will hold as long as the community is actually offended by what it sees or hears. Commentators and Commissioners alike have noted that broadcast media requires majorities, or at least sizeable plurarlities to pay the bills. If they are correct and the commission only seeks to maintain community standards, the market should limit the filth accordingly.[28]

The court told the commission that the most effective and important regulator of the broadcast media is the audience and that a program the FCC considers obscene or indecent is not violating community standards if it is drawing sufficient numbers. Significantly, the court also held that the FCC was improperly defining new legal ground in its determination that indecency differed from obscenity.

The commission filed an appeal with the U. S. Supreme Court. Pending the outcome of the appeal, the FCC was faced with a situation in which its long-sought test had exploded in its face. Not only did the possibility loom of an era where "anything goes" would be the standard for broadcasting; it now seemed that the "public interest"--or, at least, "community standards"--would be announced quantitatively by Nielsen and Arbitron.

The FCC's fears, however, did not materialize. On July 3, 1978, the Supreme Court issued a decision in favor of the FCC. This was headlined by Broadcasting as an "upset victory"[29] for federal regulation. The decision was received by broadcasters as a severe blow. In the majority opinion Justice Paul Stevens re-emphasized that there is a special relationship between broadcasting and the First Amendment and that this relationship includes the status of broadcasting as the medium receiving the least constitutional protection.[30] The majority also held that "indecency" is set off by a comma in the language of Section 1464 and, therefore, is not merely another word for obscenity,[31] at least as far as broadcasters are concerned.

The Court went on to state that the words, while not obscene, were patently offensive and that the interest of protecting minors and others from the "pervasiveness" of broadcasting justified the commission's action.

The Pacifica Foundation decision has been termed "narrow" in scope and application by both the Supreme Court[32] and the Federal Communications Commission. Chairman Charles Ferris has stated that he sees the decision as applicable to others only under almost-identical circumstances.[33] Some consolation may also be taken by the majority view that while indecency may be patently offensive and regulated in certain instances, it lies at the "periphery"[34] and not "outside" the scope of the First Amendment. But how secure is free speech when a broadcaster is expected to find comfort in the assurances of a government regulator that the authority of the commission will not be broadly used to censor program content?

In a major and vigorous dissent, in which Justice Marshall joined, Justice Brennan deemed the ruling "dangerous as well as lamentable." Brennan holds that this decision is another attempt by one group to force its norms on another. In his dissent Brennan builds upon the "pig in the parlor metaphor" used in the majority opinion by Powell. The latter holds that the FCC found a pig (seven dirty words) where it didn't belong and that the removal of the pig from its improper location does not require a ruling that it is obscene.[35] Brennan takes this analogy and refers to a decision, over a decade old, in which a state law banning bookstores from selling books unsuitable for children was voided and writes that the majority's judgment is "to burn the house to roast the pig."[36]

The FCC may now very well be able to censor at will. It clearly has a major victory with the potential for encouraging broadcasters to impose even more severe limitations upon themselves to keep the FCC at bay. The pending appeal of the 1976 Family Hour decision now takes on greater significance. The commission was given a clear order by a federal district court in California that programming decisions were the rightful domain of the local broadcaster and were not to be infringed upon by FCC through "voluntary" programs such as the "Family Viewing Hour;" nor could networks and the NAB combine to enforce such policies. Specifically the court ruled that:

1. The adoption of the family viewing hour by the networks as a group was unconstitutional.

2. The adoption of the family hour by the National Association of Broadcasters was unconstitutional.

3. NAB attempts to enforce the family hour were unconstitutional.

4. The issuing of statements by FCC Commissioners encouraging broadcasters to abide by the family hour were not only unconstitutional, but also violated the Administrative Procedures Act.[37]

If this decision is upheld on appeal, perhaps it can combine with the Pacifica Foundation ruling to provide parameters within which broadcasters can operate. Overturning the decision, coupled with Pacifica, will greatly expand the scope of FCC's power and make the First Amendment rights of broadcasters a hollow shell.

The Pacifica ruling issued by the Court of Appeals, combined with the Family Hour decision and the repeated efforts of some federal legislators to eliminate the "Fairness Doctrine"and "Section 315," give rise to the hope that broadcasting may one day lose its second-class First Amendment status. That day, if it ever comes, is certainly no longer a time we can expect soon.

Endnotes

[1]Donald M. Gillmor and Jerome A. Barron, Mass Communication Law, (St. Paul: West Publishing Company, 1974).

[2]Section 1464, Title 18, U.S. Code. The Act of June 25, 1948, consolidated a part of Section 326 with the forfeiture provisions of Section 501, both Title 47, U.S. Code.

[3]Section 326, Title 47, U.S. Code. The section of the Communications Act of 1934, until amended by the Act of June 25, 1948, ended with the sentence (prohibiting obscene, indecent and profane broadcasts) that is now the language of Section 1464.

[4]In re Eastern Education Radio, 24 F.C.C. 2d 408 (1970).

[5]KFKB Broadcasting Association v. Federal Radio Commission, 47 F. 2d 670 (D.C. Cir. 1931), at 672.

[6]Chapter 158, Section 2, 17 Statutes 599, enacted on March 3, 1873, and popularly known as "The Comstock Act." The substance and much of the wording of this law were placed in Section 1464, Title 18, U.S. Code.

[7]Byrne v. Karelekis, 396 U.S. 976 (1971), at 979.

[8]Perez v. Ledesma, 401 U.S. 82, Dyson v. Stein, 401 U.S. 200, and Byrne v. Karelekis, 396 U.S. 976 (1971).

[9]Roth v. United States, 354 U.S. 476 (1957).

[10]Miller v. State of California, 413 U.S. 15 (1973).

[11]"Filthy Words, the FCC and the First Amendment: Regulating Broadcast Obscenity", 61 Virginia Law Review 579, 618 (1975).

[12]"Putting a Censorship Lid on Topless Radio," Wall Street Journal, May 13, 1975.

[13]"Putting a Censorhsip Lid on Topless Radio," Wall Street Journal, May 13, 1975.

[14]Section 503 (b) (1), Paragraph (E), specifies a penalty of up to one thousand dollars per day for violations of Section 1464.

[15]"FCC: Closing in on Broadcast Smut," Broadcasting, February 2, 1970.

[16]Palmetto Broadcasting Company, 33 F.C.C. 250 (1962) at 253.

[17]The Federal Communications Commission has openly invited stations to appeal its rulings as in the case of Sonderling Broadcasting. The commission said, "We welcome and urge judicial consideration of our action," 41 F.C.C. 2d, 921.

[18]In re Application of the Pacifica Foundation for Renewal, 36 F.C.C. 147 (1964).

[19]In re Application of Pacifica Foundation for Renewal, 36 F.C.C. 2d at 149.

[20]In re Eastern Education Radio, 24 F.C.C. 2d 408 (1970).

[21]In re Eastern Education Radio, 24 F.C.C. 2d at 413.

[22]In re Apparent Liability of Station WGLD, Oak Park, Illinois, for Forfeiture, 41 F.C.C. 2d 919 (1973) at 925.

[23]"Putting a Censorship Lid on Topless Radio," Wall Street Journal, May 13, 1975.

[24]Illinois Citizens for Broadcasting v. F.C.C. 555 F. 2d 397, 418 ff. (D.C. Cir. 1975).

[25]In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), New York, N.Y., 56 F.C.C. 94 (1975) at 99. The full-scale investigation of this complaint went against the common practice of the commission not to investigate single complaints about isolated incidents.

[26]The seven 'dirty' words are: "shit," "piss," "fuck," "cunt," "cocksucker," "motherfucker," and "tits." The Carlin recording was a satire on language and attitudes toward words and was part of a program on that subject. Complaints to the FCC and the commission's response that it could not prevent Georgia's gubernatorial hopeful J. D. Stoner from using the word "nigger" in his political advertisements has prompted Julian Bond to ask that "nigger" be added to the list of words that are banned from the airwaves. This request may well be an indication of how the commission's and the Supreme Court's "narrow" ruling may be misconstrued by anyone who hears a word he considers inappropriate for broadcasting. "In Brief," Broadcasting, July 31, 1978.

[27]Pacifica Foundation v. F.C.C., 556 F. 2d 9 (D.C. Cir. 1977).

[28]Pacifica Foundation v. F.C.C., 556 F. 2d at 18.

[29]"It's FCC in upset victory in Supreme Court ruling in 'Filthy Words' case," Broadcasting, July 10, 1978.

[30]Federal Communications Commission v. Pacifica Foundation, 46 LW 5018 (1978) at 5023.

[31]Federal Communications Commission v. Pacifica Foundation, 46 LW at 5021.

[32]Powell's concurring opinion states in part: "The Court today only reviews the Commission's holding that Carlin's monologue was indecent as broadcast at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion." Federal Communications Commission v. Pacifica Foundation, 46 LW at 5025.

[33]"Which way the wind blows at the FCC after WBAI," Broadcasting,

July 24, 1978.

[34]Federal Communications Commission v. Pacifica Foundation, 46 LW at 5023.

[35]Federal Communications Commission v. Pacifica Foundation, 46 LW at 5024.

[36]Federal Communications Commission v. Pacifica Foundation, 46 LW at 5028.

[37]Writers Guild v. F.C.C., 423 F. Supp. 1064 (1976).

THE JURISPRUDENCE OF CENSORSHIP: PHILOSOPHIC BASES OF ANTI-PORNOGRAPHY ARGUMENTS

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The concept of censorship has attracted the attention of philosophers, jurisprudents, lawyers, and libertarians for centuries. At least since the time of Plato there have been efforts to incorporate the censorship of literature into the positive laws of society. Indeed, Plato himself envisioned such laws for his ideal republic. He suggested that "first . . . we must set up a censorship over the fablemakers, and approve any good fable they make, and disapprove the bad."[1]

Since Plato's time virtually all societies have practiced institutionalized censorship of various classes of literature. Mappes and Zembaty identify four principles that have warranted such laws. They are (1) the harm principle, (2) the principle of legal paternalism, (3) the principle of legal moralism, and (4) the offense principle.[2] This writer's purpose is to examine these principles. Each has been used to justify the legal censorship of pornography and to determine to what extent they rely, either implicitly or explicitly, upon the tenets of natural-law theory in either its Thomistic or modern formulations.

The Harm Principle

Arguments favoring censorship of pornography, based on the harm principle, fall into two major categories: those which claim that there is a causal relationship between exposure to sexually explicit materials and crimes of a sexual nature, and those which claim that the unrestricted availability of pornographic literature will have deleterious effects on the moral fabric of society as a whole.

Those who argue that there is a cause-effect nexus between pornography and criminal behavior were dealt a severe blow in 1970 by the major finding of The Report of the Commission on Obscenity and Pornography. After three years of study those who made the majority report concluded that there was "no evidence that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms such as crime, delinquency, sexual or nonsexual deviancy, or severe emotional disturbances. . . ."[3]

Recognizing that in the face of such lack of evidence any claims that pornography causes crime would be vulnerable to the charge of post hoc, ergo propter hoc, Father Morton Hill and the Reverend Windfrey Link, the principal authors of the minority report, relied on the broader claim of harm to society. Their report captures well the type of argument based on the claim of societal harm. They assert that ". . .pornography has an eroding effect on society, on public morality, on respect for human worth, on attitudes toward family love, on culture. . . . We believe it is impossible, and totally unnecessary, to attempt to prove or disprove a cause-effect relationship between pornography and criminal behavior. . . .Pornography is loveless; it degrades the human being, reduces him to the level of animal. . . . We believe government must legislate to regulate pornography, in order to protect the 'social interest in order and morality.'

Father Hill and Mr. Link were expressing a philosophic position that was neither new nor not to be heard again. Three years later, in Paris Adult Theatre v. Slaton, Chief Justice Warren Burger echoed their position in his majority opinion when he concluded that "Although there is no conclusive proof

of a connection between antisocial behavior and obscene material, the legislature of Georgia quite reasonably could determine that such a connection does or might exist."[5] He then went on to make the same broad societal-effect argument: "The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data."[6]

The same argument of harm to society, but with an interesting variation, is put forth by Professor Hilde Hein in her essay: "Obscenity, Politics, and Pornography." Writing from the feminist perspective, Hein suggests that "Pornography exaggerates, but it does not basically falsify the patterns of domination, aggression, and suppression which prevail in our culture. Pornography is exploitative and, in our male-dominated society, sexist."[7] One can't disprove Hein's hypothesis. It also falls far short of universality. Pornography is confined neither to this society nor to this century. Thus, although our society is both male-dominated and sexist, it is impossible to say whether pornography is a cause or an effect of that condition, if either.

Although Professor Hein's essay provides an interesting perspective on antipornography with reference to the harm principle, her position is ultimately disappointing, for it fails to take an actual stand on what society should do about sexually explicit materials. After a long and spirited discussion of the issue Hein equivocates in the solution step and is forced to admit that "suppression [of pornography] at the hands of the system itself, is also counterproductive. What is done must also be done by the right people and for the right reasons."[8] She adds that she does "not know how those problems [the censorship of pornography] are to be solved, except through intelligent examination of the problems."[9] Her essay unfortunately fails to move us closer to any solutions.

Another argument based on the harm principle is that of Professor Ernest van den Haag. Although his essay is entitled "Is Pornography a Cause of Crime?" the best answer van den Haag can muster is a definite maybe. Like Hill and Link he finds it impossible to establish a causal relationship between pornography and crime and so must base his position on the dubious analogy that "not all readers of Marx become Marxists, but some do; some non-readers might have become socialists anyway. Are we to say that Marx had no influence?"[10] Despite the fact that he sees grave cultural impact resulting from pornography, van den Haag, like Hein, balks at taking the final plunge and urging a strong regime of censorship upon us. Instead he advances an intriguing thesis. He begins by noting that he is instinctively "against both censors and pornographers--but more . . . against one without the other." He then suggests a sort of dynamic tension between pornography and censorship. He writes that "If we indulge pornography, and do not allow censorship to restrict it, our society at best will become ever more coarse, brutal, anxious, indifferent, de-individualised, hedonistic; at worst its ethos will disintegrate altogether."[11] He would seem to want to make of jurisprudence a cat-and-mouse game, in which the censors and the pornographers chase each other through the courts while making a shambles of the First Amendment.

In summary antipornography arguments based upon the harm principle appear to rely predominantly upon the less easily demonstrated claim of harm to the moral fabric of society rather than the more necessarily empirical claim of cause-effect relationships between exposure to pornography and subsequent criminal behavior. As such they take on a deductive aspect characteristic of natural-law arguments: Once the advocate is convinced of the material validity of his major premise (whether God-given or otherwise), he is assured of formal validity for the remainder of his argument.

The Principle of Legal Paternalism

Oxford's Gerald Dworkin defined paternalism as "the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced."[12] He goes on to distinguish two classes of paternalism: the "pure" and the "impure." In the former "the class of persons whose freedom is restricted is identical with the class of persons whose benefit is intended to be promoted by such restrictions."[13] In the latter class he suggests that "in trying to protect the welfare of a class of persons we find that the only way to do so will involve restricting the freedom of other persons besides those who are benefitted."[14]

The rationale behind various attempts at censorship is illuminated by Dworkin's division, although he does not discuss the issue *per se*. It also becomes clear that in the case of censorship there is frequently a merging of two or more of the four principles suggested by Mappes and Zembaty. Clearly censorship is a case of "impure" paternalism by virtue of the fact that the liberty of publishers, film makers, and scholars (witness the plight of Professor Churchill Roberts, of the University of West Florida, whose use of clips from the film "Deep Throat" in a class in freedom of expression has caused him to become embroiled in a legal battle still unresolved as of this printing) as well as that of the users of pornography must be restricted. Thus, the merger that is effected between the harm principle and paternalism might be called "societal paternalism." Returning to the opinion of Chief Justice Burger in *Paris Adult Theatre v. Slaton*, this type of motive opens his opinion as he asserts that "We categorically disapprove the theory. . . that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only."[15] The merger between the harm principle (on a societal level) and paternalism is found in his next paragraph, where Burger holds "that there are legitimate state interests at stake in stemming the tide of commercialized obscenity. . ."[16]

Recalling the reaction of Hill and Link to the findings of the obscenity report, we see again the ideological wedding of harm and paternalism when they express the concern that pornography "degrades the human being, [and] reduces him to the level of animal" and therefore, the "government must legislate to regulate pornography." Raising the notion of "societal paternalism" to a macro level, Richard Nixon rejected the commission's findings and asserted that pornography "could poison the well springs of American and Western culture and civilization" and therefore "the legislatures and courts at every level of American government should act in unison" to outlaw it.[17]

Although Dworkin's thoughtful essay illustrates the rationale for numerous instances of paternalistic laws, he closes with the warning that two criteria must be met any time such laws are enacted. He first requires that "In all cases of paternalistic legislation there must be a heavy and clear burden of proof placed on the authorities to demonstrate the exact nature of the harmful effects (or beneficial consequences) to be avoided (or achieved) and the probability of their occurrence."[18] Recalling the contempt with which Link and Hill viewed the requirement of proving a causal relationship between pornography and crime, one must conclude that their arguments would quickly fail this test. Dworkin's second criterion is what he calls "a principle of the least restrictive alternative. If there is an alternative way of accomplishing the desired end without restricting liberty although it might involve great expense, inconvenience, etc., the society must adopt it."[19] There is nothing in the rhetoric of Burger, Hill, or Link to suggest a willingness to suffer that kind of inconvenience.

Set in opposition to the principle of paternalism is the principle of libertarianism as articulated by its founder: John Stuart Mill. In his classic work *On Liberty* the great utilitarian clearly stakes out the ideological counterpoint to "pure" paternalism when he proclaims that ". . . the sole end for which mankind are warranted, individually or collectively, in

interfering with the liberty of action of any of their number, is self-protection. . . the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."[20] Mill's philosophy also provides rebuttal to the case of "impure" paternalism as typified by the imposition of censorship: "The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual, which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it."[21]

Among the modern writers who share Mill's position is G. L. Simons, whose book Pornography Without Prejudice argues that, whether one approaches pornography from the harm principle or the paternalistic principle, "The onus . . . is upon the anti-pornographers to demonstrate not only that harm is caused by certain types of sexual material but that the harm is considerable: if the first is difficult the second is necessarily more so, and the attempts to date have not been impressive."[22] Taking a dim view of legislation motivated by paternalism, Simons concludes that "in the absence of evidence of harm we should be permissive. Any other view is totalitarian."[23]

The examples of arguments from legal paternalism we have just examined illustrate aspects characteristic of natural-law tradition. For one to take the position that he or she "knows" what is best for other individuals, the epistemological stance that truth is, in fact, knowable is mandated. This view of the nature of knowledge has persisted in the writing of natural-law proponents since Thomas Aquinas wrote that "the natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally."[24] This Thomist influence on Catholic jurisprudents has been significant, and Father Harold Gardiner, S. J., is representative. When he writes that "Restrictions are valid only if they are for the sake of a greater good, a greater liberty,"[25] he too presupposes the ability to know that greater good and thus again illustrates the reliance of antipornography arguments upon natural-law warrants.

The Principle of Legal Moralism

Put simply, this school of thought subscribes to the proposition that societies have the right to enforce their moral standards and thus make illegal whatever is considered "immoral" behavior regardless of whether any harm attaches either to the individual or to society.

Father Hill and Mr. Link enunciated this philosophy without mincing words: "The basic question," they argued, ". . . is whether and to what extent society may establish and maintain certain moral standards. If it is conceded that society has a legitimate concern in maintaining moral standards, it follows logically that government has a legitimate interest in at least attempting to protect such standards against any source which threatens them."[26]

With equal vigor Charles Keating, the only Nixon appointee to the Commission on Obscenity and Pronography, repudiated its recommendation that laws restricting pornography be repealed as a violation of "the will of the overwhelming majority of the people of this nation" and characterized the entire report as "an advocacy of moral anarchy."[27] Nixon ominously warned that "American morality is not to be trifled with. . ."[28]

A more carefully reasoned statement of the principle of legal moralism is offered by Lord Patrick Devlin in his essay: "Morals and the Criminal Law."[29] Devlin seeks to answer three questions: (1) "Has society the right to pass judgement at all on matters of Morals?"; (2) If so, "has it also the right to use the weapon of the law to enforce it?"; and (3) "If so, ought it to use that weapon in all cases or only in some; and if only in some, on what principles should it distinguish?"[30]

Devlin answers in the affirmative to his first question by drawing an analogy to the convention of monogamy. He admits that this particular moral constraint has its roots in Christian theology but insists that "a non-Christian is bound by it, not because it is part of Christianity but because, rightly or wrongly, it has been adopted by the society in which he lives. It would be useless for him to stage a debate designed to prove that polygamy was theologically more correct and socially preferable; if he wants to live in the house, he must accept it as built in the way in which it is."[31]

Having established his first premise, Devlin makes a short inferential leap to the second premise. He now writes that: ". . . if society has the right to make a judgement and has it on the basis that a recognized morality is as necessary to society as, say, a recognized government, then society may use the law to preserve morality in the same way as it uses it to safe-guard anything else that is essential to its existence. If therefore the first proposition is securely established with all its implications, society has a prima facie right to legislate against immorality as such."[32] This leads Lord Devlin to the postulate that "there is virtually no field of morality which can be defined in such a way as to exclude the law," and, therefore, "society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."[33]

Devlin goes to greater lengths to establish the answer to this question. He ultimately rests it upon a notion revered in Anglo-American common law: the "reasonable man." In determining which cases of immorality are to be checked and under what criteria Devlin argues that "Nothing should be punished by the law that does not lie beyond the limits of tolerance."[34] But since he is compelled to admit that "The limits of tolerance shift,"[35] Devlin is also compelled to amend his policies on an ad hoc basis, a result which he is willing to accept. He accordingly concludes: "This then is how I believe my third interrogatory should be answered--not by the formation of hard and fast rules, but by a judgement in each case taking into account the sort of factors I have been mentioning. [Is it beyond the tolerance threshold of the "reasonable man"?] The line that divides the criminal law from the moral is not determinable by the application of any clear-cut principle."[36]

The principle of legal moralism, as articulated in the examples from Mill, Link, and Devlin, rests upon another fundamental tenet of natural-law philosophy: The validity of man-made laws depends upon whether they possess inherent connections to a system of morality. This fusion of what the law is and what the law ought to be is central to natural-law thought in both its Thomistic and modern formulations. For legal philosophers or political scientists who subscribe to this school of thought the existence of a positive morality is sufficient justification for marrying it to the positive laws of the society.

The Offense Principle

The fourth of the principles suggested by Mappes and Zembaty as sources of philosophic backing for laws limiting individual liberty is largely the work of Joel Feinberg and is called by him "The Offense Principle." He offers his argument as a supplement to the harm principle as a means of coping with those cases in which major segments of the population would be mortified, made ashamed, traumatized, "offended," and so on, but not actually harmed by the presence of pornography. Feinberg unfortunately rests his case on examples of offensive behavior which are so hypothetical as to be of little help in establishing the offense principle as a means of dealing with obscene behavior. For example a rich homosexual erects a signboard in Times Square touting the delights of sodomy; a man produces a folding camp toilet on a New York sidewalk, defecates in it, performs coprophagy, plays lewd phonograph records, etc. While such examples may serve to define the outer limits of a policy controversy, they do not help develop policy solutions.

Professor Feinberg posits two "mediating norms of interpretation"

which we must accept along with the offense principle: The first is the notion of the standard of universality, which means that "in order for offense (repugnance, embarrassment, shame, etc.) to be sufficient to warrant coercion, it should be the reaction that could reasonably be expected from almost any person chosen at random, taking the nation as a whole, and not because the individual selected belongs to some faction, clique, or party."[37] Feinberg inserts one class of exceptions to his requirement of universality: He would amend the offense principle to exclude from protection expression that attacks religious, racial, or ethnic minorities, but no one else.

The second "mediating norm of interpretation" Feinberg offers is the "standard of reasonable avoidability." This simply means that if potentially offensive expression can be avoided without undue inconvenience on the part of those persons who might be offended by it, it should receive constitutional protection. However, when one examines the "standard of reasonable avoidability" more closely, it is apparent that it will give little comfort to zealous antipornographers, for Feinberg insists that because of it "the offense principle . . . can give no warrant to the suppression of books on the grounds of obscenity."[38] Books with obscene or pornographic contents "hide decorously behind covers . . . sitting passively on the shelves of a bookstore, their offensiveness . . . easily avoided."[39] The logical extension of this position is that the offense principle could never be used to interfere with the access of "consenting adults" to any literature they wanted. Thus, although the offense principle may be offered as a supplement to the harm principle, it offers little support to the principles of paternalism or legal moralism and so would probably have slight appeal to those advocating censorship.

Censorship and Natural Law

This is not an exposition of the evolution of natural-law theory, but for purposes of comparison the major ideas of the major theorists will be identified. The tradition is generally taken to begin with the Summa Theologica of Thomas Aquinas in the thirteenth century, although certain aspects of it are found in Plato, Aristotle, and Cicero, long before that time. Two overriding tenets in Aquinas should be noted: First, there are universal moral truths which are discoverable by reason. Secondly, the "first precept of law," according to Aquinas, is "that good is to be done and promoted, and evil is to be avoided."[40]

Among modern thinkers in the natural-law tradition is Jean Dabin, who defines it as "nothing else than the moral rule taken in its homogeneous totality, without exclusion of any matters, but is limited to indicating their basic nature, in anticipation of developments provided by the positive moral rule and by the scientific work of the moralists."[41] Dabin goes on to assert that "All positive rules, institutions, and prescriptions whatsoever, human and even divine, in some manner depend upon and derive from natural law."[42] This leads Dabin to the conclusion that the "new style natural law" is "a rule invented by man, aiming at things useful to human life in a given social state."[43]

A. P. d'Entreves, a modern Italian philosopher, defines "natural law as the attempt to bridge the chasm between is and ought, between 'fact' and 'value.'"[44] But, cautioning against at least one of the pitfalls on the way to such a bridge, d'Entreves exhorts us to "above all, practice a healthy distrust of any 'persons or groups' who claim to have 'a clear insight into the nature of goodness.'"[45]

Philip Selznick is an American sociologist whose view of natural law is that societies are governed by "master ideals," which may have variable content from time to time. He suggests that "There are two valid interpretations of the ideal that natural law has a changing content. (1) As inquiry proceeds, it is always possible that basic premises about legality, including underlying assumptions regarding human nature and social life, will be revised. (2) As society changes, new rules and doctrines are needed in order to give effect to natural law principles by adapting them to new demands, new

circumstances, new opportunities."[46]

Legal realists have been vigorous in their rejection of natural law. Professor Alf Ross is no exception. Although jurisprudents from Austin[47] to Holmes[48] to Gray[49] to Kelsen[50] have provided incisive critiques of natural law, I am content, in this essay, with the objections raised by Ross. He first suggests that "The history of natural law reveals two striking points: the arbitrariness of the fundamental postulates concerning the nature of existence and of man, and the arbitrariness of the moral-legal ideas that are evolved on this basis."[51] In Ross's view those who subscribe to the natural-law tradition seem to be seeking a formulary approach to legal decision making. He suggests that "Natural law seeks the absolute, the eternal, that shall make of law something more than the handiwork of human beings and exempt the legislator from the pains and responsibility of decision."[52] Having observed that natural law has been invoked "in the course of time to defend or fight for every conceivable kind of demand,"[53] Ross notes that "Like a harlot, natural law is at the disposal of everyone."[54] He concludes that this "historical variability of natural law supports the interpretation that metaphysical postulates are merely constructions to buttress emotional attitudes and the fulfillment of certain needs."[55]

Have advocates of censorship relied on the postulates of natural law? A few representative excerpts from their arguments would seem to indicate that they have. Mr. Keating, joining with Father Hill and Mr. Link in the minority report of the Commission on Obscenity and Pornography, proclaimed that "To those who believe in God, in his absolute supremacy as the Creator and Lawgiver of Life, in the dignity and destiny which He confirmed upon the human person, in the moral code that governs sexual activity--for those who believe in these 'things,' no argument against pornography should be necessary . . . One can consult all the experts he chooses, can write reports, make studies, etc., but the fact that obscenity corrupts lies within the common sense, the reason, and the logic of every man."[56] The epistemology implicit in this statement clearly relies upon a belief in self-evident principles as the basis of natural laws.

With regard to the Thomistic postulate that the natural law is discoverable by reason the argument of Lord Devlin is instructive. He has set up the "reasonable man" as the criterion for making moral/legal judgements. He next writes that "Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral."[57] He concludes his essay with the statement that "Society cannot live without morals. Its morals are those standards of conduct which the reasonable man approves."[58] Devlin's reliance on such undefinables as "right-minded" and "reasonable man" rests upon an epistemological perspective that, like that of Hill, Link, and Keating, requires the a priori admission of self-evident, hence natural, truths.

Conclusion

My purpose in this essay was to examine the arguments of several important advocates of censorship of pornographic materials in order to discover to what extent they relied upon tenets of natural-law theory. It is far beyond the scope of this essay to offer a critique of natural law, but by examining the nature of arguments that find their warrant in its philosophy we are better able to appreciate the arguments themselves. As students of freedom of expression, regardless of where we stand on the issue of pornography itself, such a clearer understanding of important arguments is justified.

Endnoces

[1]Plato, The Republic, trans. W. H. D. Rouse (New York: Mentor Books, 1956), p. 174.

[2]Thomas A. Mappes and Janes S. Zembaty, eds., Social Ethics: Morality

and Social Policy (New York: McGraw-Hill Company, 1977), p. 227.

[3]Report of the Commission on Obscenity and Pornography, Commission on Obscenity and Pornography (Washington, D.C.: Government Printing Office, 1970), p. 58.

[4]Fr. Morton Hill and Rev. Windfrey Link, "Minority Report," Report of the Commission on Obscenity and Pornography, pp. 458-459.

[5]Warren Burger, Paris Adult Theatre v. Slaton, 413 U.S. 49, quoted in Mappes and Zembaty, p. 232.

[6]Burger, in Mappes and Zembaty, p. 232.

[7]Hilde Hein, "Obscenity, Politics, and Pronography," in Lawrence Habermehl, ed., Morality in the Modern World: Ethical Dimensions of Contemporary Human Problems (Encino, California: Dickenson Publishing Company, Inc., 1976), p. 193.

[8]Hein, p. 197.

[9]Hein, p. 197.

[10]Ernest van den Haag, "Is Pornography a Cause of Crime?" in Habermehl, p. 200.

[11]Van den Haag, p. 203.

[12]Gerald Dworkin, "Paternalism," in Richard A. Wasserstrom, ed., Morality and the Law (Belmont, California: Wadsworth Publishing Company, 1971), p. 108.

[13]Dworkin, p. 111.

[14]Dworkin, p. 111.

[15]Burger, in Mappes and Zembaty, p. 231.

[16]Burger, in Mappes and Zembaty, p. 231.

[17]Richard Nixon, quoted in Louis A. Zurcher, Jr. and R. George Kirkpatrick, Citizens for Decency (Austin: University of Texas Press, 1976), p. 323.

[18]Dworkin, p. 125.

[19]Dworkin, p. 126.

[20]John Stuart Mill, On Liberty, quoted in Mappes and Zembaty, p. 239.

[21]Mill, p. 239.

[22]G. L. Simons, Pornography Without Prejudice, quoted in Mappes and Zembaty, p. 244.

[23]Simons, p. 248.

[24]Thomas Aquinas, "Treatise on Law," in M. P. Golding, ed., The Nature of Law (New York: Random House, 19 ff), p. 12.

[25]Harold C. Gardiner, S. J., Catholic Viewpoint on Censorship (New York: Doubleday & Co., 1958, 1961), quoted in Franklyn S. Haiman, Freedom of Speech (Skokie, Illinois: National Textbook Company, 1978), p. 200.

[26]Hill and Link, p. 457.

[27]Charles Keating, "Minority Report," Report of the Commission on Obscenity and Pornography, pp. 580-581.

[28]Nixon, in Zurcher and Kirkpatrick, p. 343.

[29]Lord Patrick Devlin, "Morals and the Criminal Law," in Wasserstrom, pp. 24-48.

[30]Devlin, p. 31.

[31]Devlin, pp. 32-33. It is difficult to understand how Devlin reconciles this assertion with his earlier statement that "if [a state] leaves matters of religion to private judgement, it should leave matters of morals also. A State which refuses to enforce Christian beliefs has lost the right to enforce Christian morals."

[32]Devlin, p. 34.

[33]Devlin, p. 36.

[34]Devlin, p. 40.

[35]Devlin, p. 41.

[36]Devlin, p. 45.

[37]Joel Feinberg, "The Offense Principle," in Mappes and Zembaty, p. 255.

[38]Feinberg, p. 256.

[39]Feinberg, p. 256.

[40]Aquinas, in Golding. p. 18.

[41]Jean Dabin, "Is There a Juridicial Natural Law?" in Golding, pp. 27-28.

[42]Dabin, p. 28.

[43]Dabin, p. 31.

[44]A. P. d'Entreves, "Three Conceptions of Natural Law," in Golding, p. 38.

[45]d'Entreves, pp. 45-46.

[46]Philip Selznick, "Sociology and Natural Law," in Golding, p. 67.

[47]John Austin, The Province of Jurisprudence Determined, 1832.

[48]Oliver W. Holmes, Jr., The Common Law, 1881.

[49]John Chipman Gray, The Nature and Sources of Law, 1929.

[50]Hans Kelsen, General Theory of Law and State, 1961.

[51]Alf Ross, "A Critique of the Philosophy of Natural Law," in Golding, p. 69.

[52]Ross, p. 69.

[53]Ross, p. 69.

[54]Ross, p. 71.

[55]Ross, p. 72.

[56]Keating, p. 616.

[57]Devlin, p. 39.

[58]Devlin, p. 47.

THE HIGH SCHOOL PRESS AND THE FIRST AMENDMENT: A SUMMARY OF PRINCIPLES

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Despite the trend in recent years to accord juveniles and students protection under the Bill of Rights, the extent to which students' rights are coextensive with adults remains vague. The very educational system that indoctrinates its constituency into the liberties guaranteed by the Constitution often serves to frustrate the exercise of those liberties within the academic environment. Opponents of full student rights suggest that students are too young to act responsibly in many situations. Proponents argue that good constitutional doctrine should be the basis of educational policy: that individual freedom within the classroom and the educational process are not mutually exclusive.

One particularly thorny problem has been the role of the high-school newspaper. Increasingly high-school papers, once a sanctuary of apathy, nondebate, and the school's social calendar, are becoming organs of enlightened discussion and controversy. Such journalistic enterprises, in their sometimes overzealous consciousness raising, are not always kind to school administrators. Leon Letwin writes:

> When students with this perspective turn their critical attention to school, what they see is a repressive institution whose principal function is not to "truly" educate but to condition young people to accept an unsatisfactory status quo. They deliver their observations in accents that are not always restrained and polite. They discuss candidly and openly issues that are often taboo in the formal school curriculum--sex, birth control, and abortion.[1]

In general my contention is that First Amendment guarantees of press freedom are made binding on the states through the Fourteenth Amendment. School officials, as arms of the state, must uphold those freedoms. Students, therefore, are granted freedom of the press. However, the First Amendment is not absolute. School officials are empowered to make reasonable rules to enforce decorum on campus.[2]

School Officials as Representatives of the State

The legal posture of the high-school journalist toward the administration is predicated in part on the status of school officials. High-school boards are public agencies established by legislatures pursuant to state-constitutional authority.[3] A board is an instrument of state educational policy and is therefore an arm of the state. This view has consistantly been upheld by the Supreme Court, which has emphasized that boards are not immune from First Amendment limitations.[4]

School officials and teachers are considered to be under the control of school boards--that is, the state. Legally officials and teachers are responsible to the school board, not the community. Consequently, officials, as well as members of boards of education, are subject to the limitations established by the First Amendment.[5]

Powers of School Administrators: A Redefinition

School officials traditionally have exercised regulatory power over students, and courts have been reluctant to overrule school officials' decisions. Maintenance of the educational system, in the courts' view, is a compelling

reason for reasonable regulations controlling forms of conduct. But the exercise of freedom of expression--for example, the wearing of buttons with political slogans which does not hamper school activities is protected and may not be abridged.[6] But the U. S. Supreme Court has stated that "liberty of expression guaranteed by the First Amendment can be abridged by state officials if their protection of legitimate interests necessitates an invasion of free speech."[7]

However, courts have begun to scrutinize more closely administrators' decisions and have begun to establish legal parameters for regulations involving constitutionally protected activities. It appears that such regulations must at least be established pursuant to some legitimate interest and must be based on substantial evidence and not be "arbitrary and capricious."[8]

School administrators do have the power to eliminate publications by withholding financial support.[9] But courts have insisted that, once money is allocated, the threat of imminent revocation of that allocation cannot be used as a censorship device.[10] In addition, punitive measures against a student editor under the guise of some other infraction--for example, insubordination--are also legally questionable.[11]

The Scope of First Amendment Protection

Over the years censorship has been pervasive in high-school journalism. In 1974 the Commission of Inquiry Into High School Journalism concluded, among other things, these statements:

> 1. Censorship and the systematic lack of freedom to engage in open, responsible journalism characterize high school journalism. Unconstitutional and arbitrary restraints are so deeply embedded in high school journalism as to overshadow its achievements, as well as its other problems.
>
> 2. Censorship of journalism is a matter of school policy--stated or implied--in all areas of the country, although in isolated schools students enjoy a relatively free press.[12]

But, despite severe restrictions on the high-school press, courts have increasingly made it clear that high-school students enjoy the same constitutional liberties as the rest of the citizenry.[13] The Fourteenth Amendment applies to state educational institutions and serves to protect their constituencies from unreasonable constitutional abridgements.[14]

The Supreme Court has not yet considered the parameters of high-school press freedom. However, in a 1969 decision the Court held that freedom of expression cannot be abridged by school officials without a constitutionally compelling reason. In a case involving the wearing of black armbands on school grounds to protest the Vietnam War, the Supreme Court held that "students and teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[15] In its decision the Court linked free expression to the fundamental purpose of the educational process:

> The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.[16]

Obviously it is not incumbent upon any public school to establish a newspaper; but, once a paper has been established, school officials are prohibited, except in extreme circumstances, from arbitrarily limiting its content.[17] Officials may not proscribe the publication of views with which they disagree.[18] Not many school officials seek to prevent publication of unpopular views by attempting to define news in terms of specific content.[19]

Dissident groups have sometimes sought access to the high-school press through paid political advertising. Some schools have imposed, as a matter of policy, a ban on all paid political ads. However, courts have ruled that such a ban is inoperative if the paper already accepts commercial advertisement and the issue in question has previously been discussed in the news and editorial columns.[20] In such circumstances there is obviously a limited right of access not characteristic of the commercial press.

Obviously freedom of the press would be meaningless without a corollary right of distribution. In this regard officials do have discretionary powers in defining the times and places for distribution. This is essential for the normal functioning of the school environment. One court has noted:

> Clearly then, freedom of speech, which includes publication and distribution of newspapers, may be exercised to its fullest potential on school premises so long as it does not unreasonably interfere with normal school activity. Administration can properly regulate the times and places within the school building at which papers may be distributed.[21]

Whenever distribution is to be denied for just cause--for example, obscenity--guidelines regarding this denial must be specific, and procedural safeguards must be provided for a review of the school's decision.[22] In other words, distributors of printed matter must be apprised in advance, through publication of specific criteria, of any limitations on the right of distribution, and any resulting action must be subject to review through due process.

First Amendment Restrictions

Despite recent judicial developments expanding the rights of the high-school press, these First Amendment protections are not absolute. The constitutional liberties of public-school students must be balanced against the duty and obligation of the state to educate students in an orderly and decent manner.[23]

In order to insure decorum in the educational process school officials often require that all material published in the school newspaper be submitted prior to publication. It should be made clear that there is nothing unconstitutional in this requirement so long as it does not operate to stifle the content of the publication (prior restraint).[24]

Generally prior restraint is limited to two broad categories of situations: (1) communications likely to cause disruptions so substantial that it can reasonably be anticipated that the distribution would disrupt school operations and (2) those limited categories of material which the school might have a legitimate interest in regulating--for example, pornography and libel.[25] Policy decisions made pursuant to any legitimate regulatory interest on the part of the administration must be spelled out in specific terms,[26] and due process (a full hearing) must be observed in carrying out these decisions.[27] Such regulations must not be arbitrary and capricious and must be made for a justifiable end. It is almost always incumbent upon school officials to demonstrate that the need for regulation and, hence, an abridgement of constitutional liberties is more desirable than maintenance of those liberties. As the U. S. Supreme Court noted in Tinker:

> In order for the state in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[28]

And even when such actions are constitutionally permissible, the school board must provide strict safeguards to insure that such regulations are not overbroad and vague and do not transcend the parameters of the specific area selected for regulation.

A Summary of Principles: Policy Implications

It is clear that school officials are agents of the state and, as such, are constitutionally prohibited from abridging the First Amendment rights of students.

> It is undeniable that students, both on and off public school campuses, are protected in their exercise of freedom of expression by the First Amendment to the Constitution of the United States. Accordingly, it is the responsibility of the school district and its staff to assure the maximum freedom of expression to all students.[29]

High-school journalists may report on and editorialize about controversial issues; however, it is safe to assume that they are bound by the same legal obligations as the commercial press--for example, avoidance of libel and obscenity.

While school administrators may review material prior to publication, they may not routinely censor content with which they disagree, especially when such prior restraint is arbitrary and capricious. Even political advertising may not be prohibited, especially when the paper accepts commercial advertisements. In those rare circumstances where regulation is permissible, guidelines must serve justifiable ends--for example, to see that content does not raise serious legal questions or threaten the decorum of the school; and they must be specific and not overbroad. The cutting off of funds for publishing the paper to enforce the views of the administration is not a legitimate regulatory device.

The increasing freedom of high-school journalists poses serious policy problems for public-school administrators:

First of all, policies that in the past have viewed free-speech activities as basically opposed to educational objectives must be rewritten. Letwin writes:

> It is . . . misguided to see speech values as fundamentally at war with educational values. Good constitutional doctrine is equally good educational doctrine. The capacity and willingness of the young to think independently, to question and to challenge, to criticize constituted authorities and established way, are not superfluous luxuries. The development of such talents ought to be central objectives of educational policy.[30]

Recent court decisions suggest that this policy goal may soon be realized, not necessarily because all courts have agreed on the unconstitutionality of administrative censorship, but because a constitutional censorship scheme has yet to be found.[31] Most attempts at devising constitutionally acceptable administrative guidelines for school papers have not passed judicial muster.[32] But some courts have still embraced the principle that some restraints are necessary because of special circumstances such as the youth and immaturity of the students. Other courts appear "to regard our society's general hostility toward prior censorship as an appropriate stance even in the school setting."[33] However, there is a trend away from this double standard and toward the constitutional liberalism of free speech in society at large.

Secondly, school officials must be prepared to accept dissent as the norm and an alternative to the traditional homogeneity of thought which has often characterized school curricula. Such an opportunity for expression,

in some circumstances, might serve as a safety valve for more volatile behavior.

Thirdly, there will inevitably be a shift of responsibility from school officials to student journalists. While student freedoms are expanding, so are their corollary areas of responsibility.

Finally, freedom-of-expression guarantees are likely to enhance student participation in the educational process. Administrators must be responsive to (or at least aware of) student views. A two-way flow of ideas is likely to result. In this manner educational values will serve to enhance rather than thwart sound constitutional doctrine in the public-school environment.

Endnotes

[1]Leon Letwin, "Regulation of Underground Newspapers on Public School Campuses in California," UCLA Law Review, 22: 141-218 (Oct., 1974), p. 213.

[2]Robert Trager, "Freedom of the Press in College and High School," Albany Law Review, 35: 161-81 (1971), p. 161.

[3]Trager, 164.

[4]West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[5]Trager, 164.

[6]Burnside v. Byars, 363 F. 2d 744, 748 (5th cir., 1966).

[7]Dennis v. United States, 341 U.S. 494, 510 (1951).

[8]Soglin v. Kauffman, 295 F. Supp. 978 (1968), aff'd 418 F. 2d 163 (7th cir., 1969); Jones v. Tennessee, 279 F. Supp. 190 (1968), aff'd 407 F. 2d 834 (6th cir., 1969); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[9]Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (1967).

[10]Brooks v. Auburn University, 296 F. Supp. 188 (1969), aff'd 412 F. 2d 1171 (5th cir., 1969).

[11]Dickey.

[12]Commission of Inquiry Into High School Journalism, "Captive Voices: High School Journalism in America," Robert F. Kennedy Memorial, 1974, p. 47.

[13]In re Gault, 387 U. S. 1 (1966): Brooks.

[14]West Virginia State Board of Education, 637.

[15]Tinker, 506.

[16]Tinker, 512.

[17]Antonelli v. Hammond, 308 F. Supp. 1329 (1970); Dickey v. Alabama State Board of Education.

[18]Tinker, 508.

[19]Zucker v. Panitz, 299 F. Supp. 102 (1969).

[20]Zucker v. Panitz; Lee v. Board of Regents, 441 F. 2d 1257 (1971).

[21]Sullivan v. Houston Independent School District, 307 F. Supp. 1328 (1969). It should be noted that the courts are divided on the question of distribution.

[22]Quarterman v. Byrd, 453 F. 2d 54 (4th cir., 1971); Jacobs v. The Board of School Commissioners of the City of Indianapolis et. al., 349 F. Supp. 605 (1972).

[23]Schwartz v. Schuker, 298 F. Supp. 238 (1969).

[24]Shanley v. Northeast Independent School District, Bexar County, Tex., 462 F. 2d 960, 969 (1972).

[25]Quarterman.

[26]Baker v. Downey City Board of Education, 307 F. Supp. 517 (1969).

[27]Madera v. Board of Education of City of New York, 386 F. 2d 778 (2d cir., 1967); Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th cir., 1961). Also see John C. Hogan, The Schools, the Courts, and the Public Interest (Lexington, Mass.: D. C. Heath and Company, 1974), p. 87.

[28]Tinker v. Des Moines Independent Community School District, 89 S. Ct. 509, 738 (1969).

[29]Commission of Inquiry, 164.

[30]Letwin, 213.

[31]See Leon Letwin, "Administrative Censorship of the Independent Press--Demise of the Double Standard?" South Carolina Law Review, 28: 565-585 (March 1977), p. 571.

[32]For example, see Nitzberg v. Parks, 525 F. 2d 378 (4th Cir. 1975); Quarterman.

[33]Letwin, "Administrative Censorship of the Independent Press," 568.

A COMPARISON OF JOHN MILTON'S AREOPAGITICA WITH THOMAS ERSKINE'S ADDRESSES ON FREE SPEECH

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John Milton's Areopagitica and Thomas Erskine's forensic addresses on free speech constitute remarkable rhetorical documents that justify individual freedom of thought and expression. Historians concluded that Milton's Areopagitica and Erskine's addresses made commendable contributions in establishing and sustaining the principle and practice of freedom of speech.

Milton's Areopagitica remains an especially significant manuscript for creative and critical rhetorical analysis because his speech pamphlet provides a historically significant statement of Milton's political philosophy.[1] Biographers and historians recognize Milton's masterful style as an impressive command of the English language.[2]

Nevertheless, Milton's speech failed to persuade the English Parliament to remove the restrictions that regulated printing when Milton addressed the Lords and Commons in November, 1644. Haller reported that Milton's appeal appears to have gone completely unnoticed when Areopagitica was published.[3] Chafee concluded that Milton's Areopagitica accomplished nothing in his own time.[4] "Though his classic plea for a free press was not celebrated at the time, or heeded at all by those in power," Muller maintained, "Milton had drawn to a head a fundamental issue of modern history, which the Puritans were the first to dramatize on a national scale."[5] Woodward wrote that the beginnings of toleration are marked by the early poetry and prose of Milton.[6] Areopagitica evidently exerted long-range, eventual persuasion in establishing the principle and practice of free speech or perhaps summarized a philosophical concept that became a significant early justification for individual intellectual freedom.

While Milton was remembered as a writer who championed freedom of speech, Thomas Erskine established his memorable reputation as a skillful lawyer whose forensic speaking strengthened freedom of speech. Erskine engaged legal issues within specific cases pending immediately before the English courts. There Erskine became recognized as "the most important of all English orators,"[7] "the most talented forensic orator in his country's history,"[8] and the "forensic orator who stood without a rival and without a peer."[9]

Although Milton achieved no immediate influence, Erskine was effectively persuasive. May maintained that Erskine preserved freedom of discussion in the Stockdale case, freedom of opinion in the Paine case, and freedom of association in the Hardy and Tooke cases.[10] Levy stated that Erskine emerged from the Shipley case as the acknowledged leader for England's libertarians.[11] Brougham believed that Charles James Fox's libel bill was established on argumentation that Erskine employed in defending the dean of St. Asaph.[12] Erskine secured immediate rhetorical results with his spoken discourse. His theoretical speculation may have influenced colonial American statesmen who formulated the First Amendment freedoms.

The emergent question is whether Milton's Areopagitica influenced Erskine's forensic argumentation. Is there a seeming continuity of philosophical thoughts within the historical development of freedom of speech between Milton's comparatively early justification and the legal defense presented by Erskine's forensic addresses? Considerable corroborative citations from secondary sources suggest that Erskine read and memorized Milton's writings;

however, I have discovered no author who declared that Erskine knew Milton's Areopagitica or that Erskine's argumentation was influenced by Milton's literary compositions.[13] Although Milton's Areopagitica and Erskine's forensic addresses were subjected to rigorous rhetorical analysis through independent studies, neither dissertations nor theses contain comparisons.[14] No study comparing Milton's Areopagitica with Erskine's addresses did I discover in standard scholarly speech bibliographies and indexes.

Stemming from this extensive sophisticated scholarship, the purpose prompting this specific study was to determine what similarities and differences characterize the philosophical conceptions presented by Milton and Erskine and to discover a possible continuity of thought between Milton's Areopagitica and Erskine's speeches. The methodology employed was a critical rhetorical comparison analyzing the historical setting, speech structure, philosophical content, sources of verbal support, employment of arguments, and language style.

This study concentrated upon Milton's speech pamphlet and twelve forensic speeches from Erskine. Erskine's addresses were presented in his defense of Baillie on November 24, 1778; Cuthell on February 21, 1799; Gordon on February 5, 1781; Shipley on November 15, 1784; Stockdale on December 9, 1789; Paine on December 18, 1792; Frost in March 1793; Perry and Lambert on December 9, 1793; and Hardy on November 1, 1794. Included were Erskine's prosecutions of Williams on July 24, 1797; Corbett on May 26, 1804; and Symonds on July 11, 1805. Because Erskine represented the prosecution and the defense in well-known forensic cases, the lawyer examined the limitations and the extensions of freedom of speech.

Determining the accuracy and authenticity of manuscripts remained a minor problem. Hales's 1882 Oxford edition of Milton's Areopagitica was selected upon Hales's assurance that "The text of the present edition is that of the original edition of 1644, with only one intentional difference, viz. warfaring, for wayfaring, an p. 18; on which see the note."[15] Erskine's speeches from the Gordon, Shipley, Stockdale, Frost, Hardy, and Williams trials were studied from Goodrich's Select British Eloquence. Regarding his selection and employment of speeches Goodrich wrote: "They are in almost every instance given entire, because the object is to have each of them studied as a complete system of thought."[16]

Because Erskine's addresses from the Baillie, Paine, and Lambert and Perry trials were not included in Goodrich's book, I consulted Walford's 1880 edition of Erskine's speeches. Walford wrote: "The present edition contains the whole of the speeches of Lord Erskine, extracted verbatim from the Five Volume Octavo Edition of 1810."[17] The Cuthell, Symonds, and Corbett speeches were found in the High edition of Erskine's speeches.[18] Securing the complete speech was important in an attempt to study the entire system of thought. Besides this emphasis upon authenticity and completion, these sources were selected because they were easily available and because graduate studies reported in this essay employed these primary sources.

This extended rhetorical research was justified for several reasons. The methodology, a critical rhetorical comparison, seemed especially appropriate because both Englishmen examined a common conception: freedom of speech. Rhetorical discourse from Milton and Erskine is regarded by prominent scholars as historically, rhetorically, and philosophically significant. Therefore, this author nurtured an interdisciplinary approach to history-of-ideas scholarship. Finally, Milton's speech pamphlet, written for reading by members of the English Parliament, produced no immediate persuasion; but Erskine's addresses, delivered before juries charged with reaching verdicts, evoked rhetorical responses within and beyond the courtrooms. This difference in response may suggest that the specific rhetorical situations each speaker encountered influenced his employment of rhetorical principles, strategies, and objectives.

Milton's Rhetoric: The Historical Setting

The registration of publications in the Stationers' Company's books became neglected when the Long Parliament deliberated between November 1640 and June 1643. On January 29, 1642, the House of Commons enacted legislation declaring that no printer could publish or republish a composition without bearing the writer's name and without having the writer's consent. On August 26, 1642, an order held that no person or persons could print, publish, or utter any book or pamphlet, false or scandalous, against Parliament's proceedings. On March 9, 1643, provisions assigning penalties were added. In April 1643 the Stationers' Company requested that Parliament enact more extensive regulatory legislation. The Lords and Commons ordered the suppression of false, scandalous, seditious, libelous, unlicensed pamphlets, and prescribed regulations for licensing, registration, copyright, import control, search, and seizure. When the first and second editions of Milton's Doctrine and Discipline of Divorce infringed upon these parliamentary provisions, the Stationers' Company petitioned Parliament to reprimand Milton.

On November 24, 1644, Milton published his Areopagitica: A Speech for the Liberty of Unlicens'd Printing. Areopagitica appeared unlicensed and unregistered.[19] Milton's motivation was mentioned in his Second Defense of the People of England: "Lastly, I wrote, after the model of a regular speech, Areopagitica, on the liberty of printing, that the determination of true and false, of what ought to be published and what suppressed, might not be in the hands of the few who may be charged with the inspection of books, men commonly without learning and of vulgar judgment, and by whose licence and pleasure, 98 one is suffered to publish anything which may be above vulgar apprehension."[20]

Thought Content

Recognizing and respecting the Lords and Commons, Milton emphasized his single contention: "For this is not the liberty which we can hope, that no grievance ever should arise in the Commonwealth, that let no man in this world expect; but when complaints are freely heard, deeply consider'd, and speedily reform'd, then is the utmost bound of civill liberty attain'd, that wise men looke for."[21] Referring to Isocrates addressing the Athenian assembly and Dion counseling the Rhodians as historical precedents, Milton advised the Parliament to repeal the provisions regulating printing. Milton's contention was sustained with four fundamental issues that were stated in an initial summary:

> . . . I shall now attend with such a Homily as shall lay before ye, first the inventors of it to bee those whom ye will be loath to own; next what is to be thought in generall of reading, what ever sort the Books be; and that this Order availe nothing to the suppressing of scandalous, seditious, and libellous Books, which were mainly intended to be supprest; Last, that it will be primely to the discouragement of all learning, and the stop of Truth, not only by disexercising and blunting our abilities in what we know already, but by hindring and cropping the discovery that might bee yet further made both in religious and civil Wisdome.[22]

In constructing the first issue--that the inventors of printing regulations were loathed by Englishmen--Milton attributed the instigation to the most-antichristian council and the most-tyrannous Inquisition that ever inquired. Milton's second issue was that promiscuous reading remains beneficial for cultivating virtue. He maintained that a wise man, like a good refiner, can sift gold from the drossiest volume, that a fool would remain a fool with the best book, and that a wise man would employ better an idle pamphlet than a fool will utilize sacred scripture. Without an evident transition from his second issue--that knowledge of vice remains necessary for constituting human virtue--Milton blended his second issue with the third, saying that the regulation of printing through licensing requirements would not suppress scandalous, seditious, and libelous books.

Milton's final issue was that Parliament's printing regulations would discourage learning and retard the discovery of truth by blunting Englishmen's abilities in the known and hindering the finding of increased wisdom. He identified printing regulations as the greatest discouragement and affront that can be offered to learning and learned men. He called these requirements a dishonor and derogation to the author, the book, and the privilege and dignity of learning. Besides the indignity of a scholar's being treated like a grammar student under his pedagogue, making additions to a book being printed would necessitate securing the licenser's permission; teaching with authority would be minimized because a doctor would be disciplined by correction from a patriarchal licenser; and censoring a deceased author's books could be justified if that composition contained one objectionable sentence. Milton resented and renounced a censor's control over creative writing because "such iron moulds as these shall have authority to knaw out the choisest periods of exquisitest books, and to commit such a treacherous fraud against the orphan remainders of worthiest men after death, the more sorrow will belong to that hapless race of men, whose misfortune it is to have understanding."[23]

Milton contended that truth and understanding are not wares to be monopolized and traded with tickets, statutes, and standards. Neither should knowledge be treated like a staple commodity that is marked and licensed like broadcloth and wool packs. Milton mentioned his visiting learned scholars in nations where the Inquisition had discouraged learning. He cited his visit with Galileo, a prisoner of the Inquisition, who thought in astronomy differently from the Franciscan and Dominican licensers.

In discussing the fourth issue Milton explained his concept of the nature of religious truth. "Truth is compar'd," he said, "in Scripture to a streaming fountain; if her waters flow not in a perpetual progression, they sick'n into a muddy pool of conformity and tradition. A man may be a heretick in the truth; and if he beleeve things only because his Pastor sayes so, or the Assembly so determins, without knowing other reason, though his belief is true, yet the very truth he holds becomes his heresie."[24] Stressing the dynamic growth of increasing knowledge, Milton said that where there is much desire to learn, there will necessarily be much arguing, writing, and opinions. Nevertheless, "opinion in good men is but knowledge in the making." Warning the Lords and Commons that those who advocated parliamentary regulation of printing and publishing actually counseled those governors to suppress themselves, Milton said that England's democratic government was the immediate incentive for all free writing and free speaking. Milton demanded: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."[25] He affirmed his belief in the supremacy of truth by saying that although all the winds of doctrine play upon the earth, truth will triumph in a free and open encounter.

Milton's imaginative employment of carefully selected verbal support reflected his comprehensive understanding of the classical tradition, ecclesiastical history and literature, and seventeenth-century activities. He drew abundantly upon classical mythology and the scriptures.

Erskine's Rhetoric: The Historical Setting

Thomas Baillie, Lieutenant-Governor serving the Royal Hospital for Superannuated Seamen at Greenwich, reported administrative abuses in the institution's management by addressing correspondence to the hospital's council, directors, and lord commissioners of the Admiralty. Baillie's printed appeal addressed to the General Governors contended that the hospitalized seamen's health and comfort were sacrificed to corrupt contractors who participated in the administration, that positions designated for seamen were filled by landsmen, and that his complaints had been ignored. Baillie incriminated the First Lord of the Admiralty. He was suspended by the board. Those whom Captain Baillie criticized appealed to the Court of King's Bench during Trinity Term, 1778, and secured a ruling requiring him to demonstrate why an information charging him with a libel should not be presented. Erskine defended Baillie before the Court of King's Bench on November 24, 1778. Baillie was acquitted.

Thomas Erskine addressed the Court of King's Bench at Westminster on February 21, 1799, defending a bookseller in Holborn: John Cuthell, who was indicted for selling a seditious libel. The pamphlet, written by the Reverend Gilbert Wakefield, was a response to a pamphlet written by the Bishop of Landaff in 1798. At Wakefield's direction copies were sent to Cuthell, who sold the publication without examining the content until he learned about the possibly seditious content. Sales were discontinued. The lawyer argued that when an indictment charged that a composition contains a treasonable or seditious intention, when substantial evidence established the defendant's innocence in publishing the composition, in the absence of any malicious intention the judge should render a verdict concerning the defendant's negligence that negates the motives charged in the indictment. The jury found Cuthell guilty, and he was fined thirty marks.

Lord George Gordon, member of Commons and president of the Protestant Association, invited the association membership to assemble in St. George's fields and accompany him to Parliament, where they would present their petition demanding the repeal of Sir George Savile's bill granting privileges to Catholics. On June 2, 1780, they marched upon Parliament, but the governing group refused to consider the petition. The Englishmen, their procession infiltrated with criminal factions, rioted. Catholic chapels and English prisons were destroyed, foreign ministers' residences and Lord Mansfield's home were demolished, and breweries and distilleries were ruined. Gordon was arraigned for high treason and defended by Erskine before Lord Mansfield at the Court of King's Bench on February 5, 1781. Gordon was acquitted.

Sir William Jones, a prominent English lawyer, wrote a tract advocating parliamentary reform. It was published by Dean William Shipley of St. Asapn. Fitzmaurice instigated an indictment against Shipley, charging him with libel. Trial was conducted at Shrewsbury on August 6, 1784. From this decision Shipley appealed. On November 15, 1784, Erskine represented Shipley and attempted to reverse the unfavorable verdict. The Court of King's Bench unheld the earlier judgment but allowed an arrest of judgment, having discovered nothing illegal in the publication.

Preceding the impeachment activities against Governor-General Warren Hastings, which commenced before Commons, Burke's articles were published and publicly distributed. Mr. Logan, a Scottish clergyman from Leith, defended Hastings by writing a pamphlet published by John Stockdale, a Piccadilly bookseller, during the impeachment trial. Charles James Fox complained about the pamphlet before Commons. The House unanimously voted to address the King and request him to direct the Attorney-General to file an information against Stockdale, charging the publisher with libel against Commons. The information was filed. Erskine successfully defended Stockdale before the Court of King's Bench on December 9, 1789.

Thomas Paine's second part from The Rights of Man was published in England on February 17, 1792. On May 14, 1792, a warrant was issued against the printer: J. S. Jordan. On June 8, 1792, Paine was summoned to appear. The Attorney-General, charging Paine with seditious libel, decided to prosecute in November. Erskine defended Paine on December 18, 1792, although Paine remained in France, where he served as a member of the National Convention.

On November 6, 1792, John Frost, a prominent London lawyer who had returned from revolution-torn France, dined at a coffeehouse. Descending from a private dining room, Frost replied to a question, using words that were interpreted as hostile to the King. Erskine defended Frost, charged with uttering seditious words, before the Court of King's Bench during March 1793. The jury returned a verdict of guilty. Frost was sentenced to six-months imprisonment at Newgate, ordered to stand in the pillory for one hour, and struck from the roll of attorneys.

James Perry and John Lambert, the editor and the printer of the Morning Chronicle, were accused in the Attorney-General's information with publishing an address from a political organization situated in Talbot Inn,

Derby. The address was sent to the offices of the Morning Chronicle for inclusion in the newspaper. Thomas Erskine defended Perry and Lambert on December 9, 1793. When the jury presented the verdict--guilty for publication but without malicious intention--Lord Kenyon denied the response. The jury withdrew and returned a general verdict of not guilty.

Thomas Hardy, a London shoemaker and secretary for the London Corresponding Society, was indicted with Horne Tooke and ten other defendants for attempting to persuade the English citizenry to assemble in a national convention to demand parliamentary reforms. Lord Loughborough instigated proceedings that produced an indictment for high treason. Erskine defended Hardy with a forensic speech before the Court of King's Bench on November 1, 1794. Erskine later defended Tooke, charged with the same offense, in the Session House of Old Bailey on November 19.

Thomas Williams, a London bookseller, was prosecuted by the Society for the Suppression of Vice and Immorality for publishing Thomas Paine's Age of Reason. Speaking for the prosecution, Erskine, recognizing the limitations upon freedom of speech, presented his forensic speech against Williams before Lord Kenyon and a special jury on July 14, 1797. Nearly five years earlier Erskine had defended Paine for writing his Rights of Man.

The Solicitor-General of Ireland, W. C. Plunkett, charged William Corbett with publishing a libel against Plunkett. Erskine represented the plaintiff before Lord Ellenborough and a special jury at Westminster on May 26, 1804. The jury returned a verdict for the plaintiff, setting the damages at five hundred pounds.

John Thomas Troy brought charges to recover damages from the publication of a libel. Trial was conducted with a special jury before Lord Ellenborough at King's Bench on July 11, 1805, Thomas Erskine following his cocounsel in behalf of the plaintiff. The case was resolved with a verdict favoring the plaintiff and damages set at fifty pounds.

Thought Content

By the nature of the specific "rhetorical situations" that evoked the rhetorical responses, Erskine's forensic speeches concerned the innocence or the guilt of individual persons charged with specific criminal actions.

Erskine's defense of Captain Baillie was constructed around specific rhetorical questions about Baillie. The rhetorical canon of invention was circumscribed by the inherent legal issues within the immediately pending case. Erskine identified Baillie, described Baillie's administrative responsibility, discussed the development of his protest, and explained his motivation. He argued that Baillie had a professional obligation to investigate, that the abuses existed and arose as Baillie charged, that he presented his charges through appropriate channels to legitimate authorities, and that he confronted the unavoidable imperative that required acting decisively to rescue Greenwich Hospital.[26]

Erskine's defense of Lord Gordon contained an introduction in which the lawyer requested the court's indulgence, explained the legal definition of treason, admitted that treason constituted the highest and most atrocious crime, and affirmed Gordon's innocence. Essential within Erskine's forensic defense was the carefully phrased legal definition identifying treason as "to compass or imagine the death of the King" or "to levy war against him in his realm." Erskine championed Gordon's innocence by applying that precise prescription to the specific facts.

The structure of Erskine's defense of Shipley seems to have been disciplined by the lawyer's presentation of five fundamental propositions "from the establishment of which I resolved not to depart, nor to be removed, neither in substance or in order, in any stage of the proceedings, and by which I must therefore this day unquestionably stand or fall."[27] Erskine's

legal responsibility was "to re-maintain those propositions, and then to show that the charge delivered to the jury at Shrewsbury was founded upon the absolute denial and reporbation of them."[28] Erskine contended that in such cases the jury is charged with certain responsibility, that no criminality exists without mischievous intention, that libel cases form no exceptions to general legal principles, that the verdict should depend upon the jury's keen determination of the writing's tendencies toward causing certain consequences, and that this essential question concerning the author's intention becomes a question of fact for the jury's judgment.

In the Stockdale case Erskine began with an introduction acknowledging Stockdale's confidence in his lawyer as expressed by his engaging Erskine to be his advocate. Erskine advanced three reasons why an indictment must be phrased precisely: that the defendant may know the specific charge, that the jury may be warranted in rendering the verdict, and that the court may recognize the specific crime when prescribing punishment. Erskine described the historical background. He contended that every publication should be considered as a totality and not judged from detached passages; that when an author's spirit and intention are constructive, the writer should not be punished for excessive expression prompted during heated debate, although the statements might constitute libel when considered by themselves; that the general welfare of English government requires freedom of individual's expression; and that when a publication is decent in language and peaceful in import, the writer who ponders a subject without bringing contempt upon the government should not be censored for violating the norms of candor and propriety.

Erskine's defense of Thomas Paine started with the lawyer's attempt to dismiss a letter from Paine which the prosecution had introduced, statements explaining the motivations that prompted the prosecution and defense, and a pledge of fidelity in discharging his professional responsibilities. Erskine said: "The law of England, then, both in its forms and substance, being the only rule by which the author or the work can be justified or condemned, and the charge upon the record being the naked charge of a libel, the cause resolves itself into a question of the deepest importance to us all--the nature and extent of the liberty of the English press."[29] Erskine argued that, with certain reservations, every sincere man may address himself to the universal reason of the entire nation concerning the government and that he who writes what he does not think is criminal.

Erskine's defense championing Frost commenced with the lawyer's explanation about his involvement in the case. He contended that neither the French Revolution nor English unrest should influence the indictment against Frost. Erskine contended that the defendant's statements should be interpreted within the context in which they were spoken and that the right of the English people to criticize their government should be respected. After insisting that the charge against Frost must be stated precisely, Erskine argued that a criterion constructed from relevant legal principles should be applied to the Frost case.

In his defense of Perry and Lambert the lawyer identified himself as an acquaintance who knew the defendants, affirmed their innocence, acknowledged his professional responsibility, summarized the case, and reminded the jurors about their duties. He emphasized that a case concerning libel should be considered like any other criminal case, that criminality consists in malicious intention, and that not an act but the motive from which the act proceeds is the basis of guilt or innocence. "We are criminal only in the eyes of God and man," he said, "as far as the mind and intention in committing any act has departed from the great principles of rectitude by which we are bound as moral agents, and by the indispensable duties of civil society."[30] Erskine's argumentation lacked discriminative accuracy between ethics, morality, and law. He examined the specific charge against a general English legal principle and maintained the defendants' innocence.

Simplicity characterized the structured argumentation with Erskine's

defense of Williams. He explained the trial's postponement, his motivation for serving as prosecuting lawyer, the general nature of the anticipated defense, the principle of freedom of the press, and his counsel that persons who cherish civil liberties should hesitate in attacking Christianity.

The theme or thesis that pervaded Erskine's forensic speeches was freedom of speech. Sometimes Erskine transcended the immediate, inherent legal issues and the general judicial principle to consider a philosophical justification for sustaining or limiting individual freedom of expression.

Erskine emphasized the propriety of communication channels when he championed Baillie by contending that the defendant presented his legitimate complaints to an appropriate receiver, discharging his professional responsibility.

Demanding that fundamental freedoms be preserved in the Gordon case, Erskine insisted: "The condition of an Englishman would be no better than a slave's at the foot of a sultan; since there is little difference whether a man dies by the stroke of a saber, without the forms of a trial, or by the most pompous ceremonies of justice, if the crime could be made at pleasure by the state to fit the fact that was to be tried."[31] After presenting a comprehensive, technical definition of treason Erskine argued that the "hostile mind is the crime" and that Gordon was innocent unless "the prisoner is a determined traitor in his heart." He stated: "It is the privilege and the duty of all the subjects of England, to watch over their religious and civil liberties, and to approach either their representatives or the Throne with their fears and their complaints, a privilege which has been bought with the dearest blood of our ancestors, and which is confirmed to us by law, as our ancient birth-right and inheritance."[32]

In the Stockdale case Erskine attempted to transcend the immediate issue--whether or not Stockdale published the contested composition. He admitted the fact of publication. Lord Kenyon instructed the jury not to consider whether the content was libelous but simply whether or not Stockdale was the publisher. Erskine insisted: "Your inquiry, therefore, is not confined to this, whether the defendant published those selected parts of it; and whether, looking at them as they are distorted by the information, they carry, in fair construction, the sense and meaning which the innuendoes put upon them; but whether the author of the entire work--I say the author, since, if he could defend himself, the publisher unquestionably can--whether the author wrote the volume which I hold in my hand, as a free, manly, bona fide disquisition of criminal charges against his fellow citizens."[33] Erskine admitted that Stockdale was the publisher but requested a verdict of innocence upon the ground that the content was decent. He argued that every publication should be examined in its complete form, that the writer's intention constitutes the essential element, that the general welfare of the English government requires individual freedom of expression, and that English juries should consider the content as well as the fact of publication.

The crucial question in the Paine case, Erskine said, was the nature and extent of the freedom of the English press. He maintained that every man who does not intend to mislead and who seeks to enlighten others with reason and conscience, however erroneously, may appeal to the reason of the entire nation. No prior restraint should be imposed upon communicative discourse. He explained that while personal opinion remains unfettered, behavior alone becomes subject to legal restraint, that personal liberties are secured through governmental sanctions, and that through the exercise of individual freedom government becomes disciplined to the responsibility of securing and sustaining personal liberty. Emphasizing the social utility provided by individual freedom of speech, Erskine asked:

> If, in the march of the human mind, no man could have gone before the establishments of the time he lived in, how could our establishment, by reiterated changes, have become what it is? If no man could have awakened the public mind to errors and abuses in our Government, how could it have passed on from stage

> to stage, through reformation and revolution, so as to have arrived from barbarism to such a pitch of happiness and perfection, that the Attorney-General considers it as profanation to touch it further, or to look for any future amendment?
>
> In this manner power has reasoned in every age; Government, in its own estimation, has been at all times a system of perfection; but a free press has examined and detected its errors, and the people have from time to time reformed them. This freedom has alone made our Government what it is; this freedom alone can preserve it; and therefore, under the banners of that freedom, today I stand up to defend Thomas Paine.[34]

Powerfully Erskine stated his conviction: "When men can freely communicate their thoughts and their sufferings, real or imaginary, their passions spend themselves in air, like gunpowder scattered upon the surface; but, pent up by terrors, they work unseen, burst forth in a moment, and destroy everything in their course. Let reason be opposed to reason, and argument to argument, and every good government will be safe."[35] He quoted from Areopagitica and eulogized Milton, describing him thus: "He was, indeed, no plagiary from anything human; he looked up for light and expression, as he himself wonderfully describes it, by devout prayer to that great Being who is the source of all utterance and knowledge; and who sendeth out His seraphim with the hallowed fire of his altar to touch and purify the lips of whom He pleases."[36]

Erskine's spirited forensic defense for Frost indicates how historical conditions and circumstances influence the "rhetorical situation." Fear spread through England when France trembled with revolution. Erskine maintained that the turbulence disturbing France should not become a pertinent consideration employed for imposing increased limitations upon Englishmen's fundamental freedom. "But I assert," he said, "that neither the actual condition of France, nor the supposed condition of this country, are, or can be, in any shape, before you; and that upon the trial of this indictment . . . the words must be judged of as if spoken by any man or woman in the kingdom, at any time from the Norman Conquest to the moment I am addressing you."[37] Erskine acknowledged the assumption that political turmoil disturbing France was interpreted sometimes as a threat against England, but the lawyer renounced the possibility that the defendant's conduct constituted systematic disaffection from the English kingdom. "They have a right," he said of the French, "like every other person upon earth, to change their government; the system destroyed was a system disgraceful to free and rational beings; and if they have neither substituted, nor shall hereafter substitute, a better in its stead, they must eat the bitter fruits of their own errors and crimes."[38]

After minimizing implications stemming from the French Revolution, Erskine reconstructed the coffeehouse context in which Frost, under the influence of strong drink, uttered his contested statements. Pondering the consequences for the future, Erskine questioned: "Must an English gentleman in the future fill his wine by a measure, lest, in the openness of his soul, and while believing his neighbors are joining with him in that happy relaxation and freedom of thought which is the prime blessing of life, he should find his character blasted, and his person in a prison?"[39] Erskine sustained the privilege of privacy. He stated that God alone can look into the human heart and that man, if he could comprehend those recesses, has no jurisdiction until human society becomes disturbed through overt behavior.

When Erskine defended Perry and Lambert, the lawyer contended that criminality constitutes a matter of the mind, an intention or motive to violate the "great principles of rectitude." What Erskine never explained adequately is how intention and motive are determined. He missed an appropriate opportunity to discuss how hidden depths within the human heart provide a sanctuary upon which even law cannot intrude.

Erskine's prosecution of Williams, like his argumentation against Corbett and Symonds, attested that legitimate limitations upon freedom of

expression are necessary. He contended that blasphemy threatened the social structures sustaining the English government. Attempting to avoid an almost-inevitable impression of inconsistency, he insisted that nothing he had previously stated about freedom of speech was denied in his prosecution of Williams. He explained: "A free and unlicensed press, in the just and legal sense of the expression, has led to all the blessings, both of religion and government, which Great Britain, or any part of the world, at this moment enjoys . . . But this freedom, like every other, must be limited to be enjoyed, and, like every human advantage, may be defeated by its abuse."[40] Examining the principle of freedom of expression, Erskine advised that all free establishments should permit unbounded freedom of discussion and that no restraint or restriction should be imposed upon any communicative act that is fairly, honestly, and decently addressed to the human conscience and understanding. However, this implied important qualifications or reservations: "Every man has a legal right to investigate, with modesty and decency, controversial points of the Christian religion; but no man, consistent with a law which only exists under its sanctions, has a right not only broadly to deny its very existence, but to pour forth a shocking and insulting invective, which the lowest establishments in the gradations of civil authority ought to be permitted to suffer, and which soon would be borne down by insolence and disobedience, if they did."[41]

Erskine assumed that the structures and the systems of "secular" government are established upon the sanctions from Christian authority. This was a dangerous assumption, which has fostered great human misery. When state and church were joined, for example, blasphemy was equated with treason because an attack upon "revealed religion" was equated with an attack upon the crown. Nevertheless, Erskine condemned Paine's Age of Reason, contending that this controversial composition undermined humanity's consolation within a wretched world containing afflictions and distress. What Erskine's defense of Paine for writing Rights of Man and his prosecution of Williams for publishing Paine's Age of Reason suggest seems significant: Attacking political authorities was easier and safer than attacking religious authorities during the late eighteenth century.

What Erskine evidently never comprehended was that a decisive difference exists between legal authority acknowledged in a courtroom and the theological authority that exists within the ecclesiastical establishment. Each of these rhetorical contexts lends itself to particular legitimate authority. While maintaining that Thomas Paine's Age of Reason would destroy democratic government and nurture despotism, Erskine blandly contended that an intellectually sophisticated composition will automatically prompt advantageous consequences.

> An intellectual book, however erroneous [he said] addressed to the intellectual world, upon so profound and complicated a subject, can never work the mischief which this indictment is calculated to repress. Such works will only employ the minds of men enlightened by study in a deeper investigation of a subject well worthy of their profound and continued contemplation. The powers of the mind are given for human improvement in the progress of human existence. The charges produced by such reciprocations of lights and intelligences are certain in their progressions, and make their way imperceptibly, as conviction comes upon the world, by the final and irresistible power of truth.[42]

What Erskine failed to recognize was that if there actually is "the final and irresistible power of truth," then that "truth" will eventually triumph without imposing censorship. Both John Milton and Thomas Erskine espoused that common conviction. Erskine lacked historical knowledge about the persecution and ignorance practiced by the advocates of institutional Christianity. They employed religious sanctions to burn heretics, condemn books, and loot libraries. Sustained by what some bigots believed was their "final and irresistible power of truth," churchmen have sometimes instigated persecutions and inquisitions in attempting to make nonbelievers conform.

Erskine's language became elevated, even eloquent, when he discussed freedom of speech as a general philosophical abstraction. This helpful rhetorical technique gave the appearance of defense of a great principle for an advocate who nevertheless imposed restrictions and limitations upon free speech. With a stream of powerful eloquence Erskine said:

> From minds thus subdued by the terrors of punishment, there could issue no works of genius to expand the empire of human reason, nor any masterly compositions on the general nature of government, by the help of which the great commonwealths of mankind have founded their establishments; much less any of those useful applications of them to critical conjectures, by which, from time to time, our own Constitution, by the exertion of patriot citizens, has been brought back to its standard. Under such terrors, all the great lights of science and civilization must be extinguished; for men can not communicate their free thoughts to one another with a lash held over their heads. It is the nature of everything that is great and useful, both in the animate and inanimate world, to be wild and irregular, and we must be contented to take them with the alloys which belong to them, or live without them. Genius breaks from the fetters of criticism, but its wanderings are sanctioned by its majesty and wisdom when it advances in its path: subject it to the critic, and you tame it into dullness.[43]

In the Williams prosection Erskine grew emotionally agitated. "I am well aware," he admitted, "that by the communication of a free press, all the errors of mankind, from age to age, have been dissipated and dispelled; and I recollect that the world, under the banners of reformed Christianity, has struggled through persecution to the noble eminence on which it stands at this moment, shedding the blessings of humanity and science upon the nations of the earth."[44] He questioned through what means the Protestant Reformation might have happened if the books from the reformers had been suppressed and the errors from condemned superstitions had been supported as unquestionable by a sovereign state.

The articulate English advocate who grew eloquent when he championed a general concept about freedom of expression recognized that speech should not be employed to damage the reputations of respected citizens. When Erskine prosecuted Corbett on May 26, 1804, the lawyer acknowledged that the pen is dangerous when unrestricted by morality and the law. He contended that Corbett committed libel by calling Lord Hardwicke "a feeder of sheep in Cambridgeshire" and Lord Redesdale "a chancery pleader from Lincoln's-inn." He argued that "a man is entitled to that tranquillity happiness, and peace of mind, which is the result of an honorable reputation, provided his conduct in life entitles him to it."[45] The lawyer maintained that words that scandalize magistrates or persons holding public trust are more injurious than words spoken against private men. Protection for men holding prominent public postiions seemed especially important during Erskine's prosecutions. He said:

> There is implanted in every man's bosom an invincible sensibility to the opinion of his fellow creatures, which nothing can destroy; it is the foundation of all patriotism, the sentiment which rears states from infancy to maturity, the principle that makes men struggle for distinction, and keeps them in the straight paths of their duty when called to the high offices of magistracy. The laws of society, therefore protect mankind in this dearest of all human blessings; and if any man writes of another that which is injurious to him in his trade, profession, or character, or which tends to expose him to penalties, or brings him into contempt, it is libellous, and the law deems it an object of penal animadversion.[46]

That stricture seemed relevant when Erskine prosecuted Symonds on July 11, 1805. He contended that the damage inflicted upon the physical human body seems less injurious that wounds upon the human mind and spirit. Erskine

described Troy, a Roman Catholic priest serving as titular archbishop from Dublin, as an unoffending individual who had been unjustly and publicly calumniated through scandalous defamation. Realizing that alienation from persons holding different religious convictions had enlivened animosities and antagonism among humankind and retarded a reformation that would unite the whole Christian world, Erskine presented an appeal for religious toleration. Troy, Erskine contended, was entitled to the same measure of justice as any other man. As a Roman Catholic Troy embraced religious convictions that differed from beliefs affirmed by members of the English jury. Nevertheless, he said that "Protestants and Catholics are as one in a court of law, and in the person of the plaintiff you will see that honor, patriotism, and truth, are to be found in the one class as in the other."[47] Concluding his forensic argumentation supporting a Catholic priest before Protestant jurors, the Protestant lawyer said: "You will prove by your judgment that though other states and kingdoms may enjoy advantages in the natural world which we do not possess, yet that in the moral world we are superior to them all; and as this is the first case in which a Catholic clergyman appeals from one part of the empire to a Protestant tribunal in another, you will distinguish it also by the purity of the decision."[48]

Conclusions

As an exercise in the intellectual history of ideas this rhetorical research leads to several conclusions:

The rhetorical situations encountered by Milton and Erskine governed the thought content within their addresses by circumscribing the classical canon of invention. Milton, presenting a deliberative speech to the members of the English Parliament, provided a philosophical justification sustaining individual freedom of thought and expression. Erskine, serving as a professional lawyer in the English courts, applied specific laws and general principles to pending legal cases concerning specific individuals. With eloquence each responded to an immediate situation in which the principle and the practice of free speech received thoughtful philosophical analysis. In these instances, however, the strong emotion with which Milton and Erskine defended their fundamental concepts of individual intellectual freedom evoked powerful rhetorical discourse. While Milton and Erskine championed general philosophical principles about free speech and while Erskine applied specific legal statutes to specific cases, both acknowledged definite limitations on freedom of speech. Milton excluded certain groups (such as atheists) and Erskine accepted restrictions (libel), thereby recognizing free speech as a limited, qualified privilege sanctioned not as an essential human right but as a helpful social utility.

Thomas Erskine knew John Milton and quoted Milton's Areopagitica. During his forensic defense of Thomas Paine, Erskine directly quoted Milton's speech pamphlet and eulogized the author. He later cited Milton as a champion who defended English liberty and referred to Paradise Lost. This study does not provide sufficient justification to conclude that John Milton's Areopagitica influenced the philosophical content in Thomas Erskine's forensic speeches. The English law, not Milton's speech, provided the primary resource for Erskine's rhetorical invention in his forensic addresses.

Endnotes

[1]J. B. Bury, A History of Freedom of Thought (London: Oxford University Press, 1953), p. 77; F. E. Hutchison, Milton and the English Mind (London: Hodder and Stoughton Limited, 1946), p. 65; E. L. Woodward, History of England (London: Methuen and Company, 1925), p. 155; and Winston S. Churchill, A History of the English-Speaking Peoples: The Birth of Britain (New York: Dodd, Mead and Company, 1958), p. xix.

[2]Rose Macaulay, Milton (London: Duckworth, 1934), p. 90; Stopford A. Brooke, Milton (New York: D. Appleton and Company, 1903), p. 45; and Mark Pattison, Milton (New York: Harper and Brothers, 1880), p. 79.

[3]William Haller, Liberty and Reformation in the Puritan Revolution (New York: Columbia University Press, 1955), p. 187.

[4]Zechariah Chafee Jr., Freedom of Speech and Press (Cambridge: Harvard University Press, 1942), p. 34.

[5]Herbert J. Muller, Freedom in the Western World (Evanston and New York: Harper and Row, 1963), p. 298.

[6]Woodward, History of England, 155.

[7]Charles Kendall Adams, ed. Representative British Orations, I (New York: G. P. Putnam's Sons, 1884), p. 272.

[8]Guy Carlton Lee, ed. The World's Orators, VII (Philadelphia: International Publishing Company, 1906), p. 2.

[9]James L. High, ed. Speeches of the Right Hon. Lord Erskine at the Bar, I (Chicago: Callaghan, 1876), p. 24.

[10]Thomas Erskine May, The Constitutional History of England 1760-1860, II (New York: A. C. Armstrong and Sons, 1889), pp. 119-59.

[11]Leonard W. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (Cambridge: Harvard University Press, 1960), p. 249.

[12]Lord Henry Brougham, ed. The Speeches of the Right Hon. Lord Erskine at the Bar and in Parliament, I (London: Ridgway, 1847), p. xv.

[13]Lloyd Paul Stryker, For the Defense: Thomas Erskine, the Most Enlightened Liberal of His Times, 1750-1823 (Garden City: Doubleday and Company, 1947), pp. 18-19; Carroll C. Arnold, "Lord Thomas Erskine: Modern Advocate," The Quarterly Journal of Speech, XLIV (February, 1958), 17; Lord John Campbell, Lives of the Lord Chancellors and Keepers of the Great Seal of England, VIII (New York: Cockcroft and Company, 1878), p. 11; J. A. Lovat-Fraser, Erskine (Cambridge: The University Press, 1923), p. 3; William Mathews, Oratory and Orators (Chicago: Grigg, 1877), p. 347; Chauncey A. Goodrich, ed. Select British Eloquence: Embracing the Best Speeches Entire, of the Most Eminent Orators of Great Britain for the Last Two Centuries (New York: Harper and Brothers, 1880), p. 630.

[14]Wilbur Elywn Gilman, "Milton's Rhetoric: Studies in His Defense of Liberty" (unpublished dissertation, Cornell University, Ithaca, 1937); William Ernest Young, "The Rhetorical Methods of Thomas Erskine: A Critical Study in Argumentation" (unpublished thesis, the State University of Iowa, Iowa City, 1928); Lloyd Watkins, "Argumentation of Thomas Erskine in the Trial of Thomas Hardy" (unpublished thesis, the University of Wisconsin, Madison, 1951); Lawrence Raymond Rumley, "The Pleas of Thomas Erskine in Selected Trials for Criminal Conversation 1879-1805" (unpublished thesis, Cornell University, Ithaca, 1951); and Merrill T. Baker, "A Rhetorical Analysis of Thomas Erskine's Courtroom Defenses in Cases Involving Seditious Libel" (unpublished dissertation, the State University of Iowa, Iowa City, 1952).

[15]John Milton, Areopagitica, ed. John W. Hales (Oxford: Clarendon Press, 1882), p. xliii.

[16]Goodrich, Select British Eloquence, iii.

[17]Edward Walford, ed. Speeches of Thomas Lord Erskine (London: Reeves and Turner, 1880), p. v.

[18]James L. High, ed. Speeches of Lord Erskine while at the Bar, IV (Chicago: Callaghan, 1876).

[19]David Masson, The Life of John Milton: Narrated in Connexion with the Political, Ecclesiatical and Literary History of His Time, III (London: Macmillan, 1873), p. 278.

[20]John Milton, "Second Defense of the People of England Against Infamous Anonymous Libel," The Works of John Milton, ed. Frank Allen Patterson, et. al., VIII (New York: Columbia University Press, 1933), pp. 133-35.

[21]Milton, Areopagitica, 1-2.

[22]Milton, Areopagitica, 5.

[23]Milton, Areopagitica, 33.

[24]Milton, Areopagitica, 38-39.

[25]Milton, Areopagitica, 60.

[26]Erskine, "Speech for Captain Baillie," Speeches of Thomas Lord Erskine, pp. 4-5.

[27]Erskine, "Speech of Mr. Erskine on the Rights of Juries," Select British Eloquence, p. 657.

[28]Erskine, "Rights of Juries," 657.

[29]Erskine, "Speech in Defense of Thomas Paine," Speeches of Thomas Lord Erskine, p. 235.

[30]Erskine, "Trial of Mr. Parry and Mr. Lambert, Editor and Printer of the Morning Chronicle," Speeches of Thomas Lord Erskine, p. 311.

[31]Erskine, "Speech of Mr. Erskine in Behalf of Lord George Gordon," Select British Eloquence, p. 639.

[32]Erskine, "Gordon," 633-34.

[33]Erskine, "In Behalf of John Stockdale," Select British Eloquence, p. 685.

[34]Erskine, "Paine," 237.

[35]Erskine, "Paine," 258.

[36]Erskine, "Paine," 276.

[37]Erskine, "Speech of Mr. Erskine in Behalf of John Frost," Select British Eloquence, p. 699.

[38]Erskine, "Frost," 701.

[39]Erskine, "Frost," 704.

[40]Erskine, "Speech of Mr. Erskine Against Thomas Williams," Select British Eloquence, pp. 761-62.

[41]Erskine, "Williams," 763.

[42]Erskine, "Williams," 767.

[43]Erskine, "Stockdale," 697.

[44]Erskine, "Williams," 762.

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[45]Thomas Erskine, "Plunkett v. Corbett," Speeches of Lord Erskine while

at the Bar, IV, pp. 333-34.

[46]Erskine, "Plunkett v. Corbett," 334.

[47]Erskine, "Troy v. Symonds," Speeches of Lord Erskine while at the Bar, IV, p. 359.

[48]Erskine, "Troy v. Symonds," 370.

THE RIGHT TO SPEAK: THE FREE SPEECH FIGHTS OF THE INDUSTRIAL WORKERS OF THE WORLD

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> 5,000 men and women, who believe in freedom of Speech, Press, and Public Assemblage, to be in Spokane, Wash., on March 1st and show contempt for home-made laws that are enacted for the purpose of keeping the workers in ignorance.
>
> . . . . . .
>
> Come and show your contempt for those who tramped the Constitution of the United States into the Earth, and thus break the laws themselves.[1]

With this call to action the Industrial Workers of the World summoned its membership to participate in a free-speech fight. In the decade between 1906 and 1918 the IWW conducted more than twenty-six such fights in communities as divergent as Missoula, Montana; San Diego, California; and Paterson, New Jersey.

These colorful episodes were not merely libertarian defenses of abstract First Amendment doctrine but, rather, pragmatic tactics designed to remedy specific denials of free speech while at the same time rhetorically advancing the ideology of the movement. These free-speech fights were unique rhetorical tactics as well as significant episodes in the history of freedom of speech.

History of the Battles for Free Speech

When the IWW was founded in 1905, its leadership had little notion that the organization would become an early defender of the First Amendment; yet within a year the ideology of the IWW and its rhetorical tactics came into direct confrontation with a repressive society. In response to the exigencies of the confrontation the WW developed its unique rhetorical strategy--the free-speech fight.[2]

It is not surprising that the IWW and its radical ideology met with suppression from reactionary defenders of capitalism.[3] The ideology of the IWW was a product of the dissatisfaction of small groups of socialists, anarchists, industrial unionists, and dissident trade unionists. Advancing a radical, Marxian concept of revolutionary industrial unionism, the IWW sought to organize the working class along industrial lines and to abolish the capitalist system. It also sought to organize society's outcasts--immigrants, the Negroes, and migratory workers.[4]

Suppression occurred in conservative communities of the Pacific Northwest and California, where the IWW had begun active agitation among itinerant lumber workers and migratory farm workers. The campaign relied heavily upon colorful soapboxers to attract large crowds of idle workers wintering in the skid rows of western communities.[5] It was essential that these agitators have free use of the streets if they were to reach workers who might be most receptive to the Wobbly message. Totally hostile to the ideology of the IWW, employers pressured municipal governments to pass speaker-ban ordinances or, in some instances, to use co-operative police-censor squads.[6]

IWW agitators faced several constraints in responding to these legal and extralegal limitations on his freedom of speech. In the first place, the IWW did not have access to the councils of government and consequently could not respond to suppression in normal, institutional ways. More-

over, the IWW's intransigent ideology, rejecting political and judicial avenues of redress as contrary to the class struggle, further limited its available responses.[7] Finally, even if the IWW had chosen to challenge the constitutionality of gag laws, it is doubtful that such appeals would have worked. The Fourteenth Amendment door to First Amendment challenges of municipal or state laws was not to be opened until 1925 with the ruling in Gitlow vs. New York (268 US 652). So, faced with suppressive gag laws and with limited avenues of response, the IWW met the situation with direct action.

The pattern of the free-speech fight developed in an almost-classic form of civil disobediance. Once the Wobbly leaders decided to fight an ordinance against street speaking, the call went out through the IWW press and "general office bulletins" for all footloose members of the IWW to come to a particular community and join the fight.[8] Arriving at the scene, Wobblies would line up at a designated corner to speak or read from documents like the Constitution or the Declaration of Independence. As expected, the police would move in and arrest an offending speaker and cart him off to jail. No sooner would one speaker be arrested than another would take his place. In this fashion the protest continued until the jails were filled with Wobblies, each demanding a separate trial. Ultimately the protest made it financially and physically prohibitive to enforce the ordinance, and in most instances it was abolished or significantly altered.

The 1909 Spokane free-speech struggle illustrates the scope and effectiveness of the Wobbly tactic. During the five months of the fight more than six hundred Wobblies were jailed, and more than twelve hundred arrests were made. The jails were filled beyond capacity. Still, fresh Wobblies arrived from points as far away as Pennsylvania, Maine, Canada, and Mexico, willing to stand up, speak out, and go to jail.[9] Five months after the fight began, the city capitulated and granted the IWW most of its demands.

Clearly the free-speech fight was a rhetorical tactic in the civil-disobedience tradition we have come to know in the civil-rights and antiwar movements of the 1960s and 1970s. It was an instrumental act, pragmatic and purposive, a specific means toward a specific end. Clearly it was an available means of persuasion.

Likewise, the free-speech struggle was symbolic. The physical presence of free-speech fighters became symbolic. The IWW's tactic was directed to both the membership of the IWW and the communities in which the fights occurred. By inviting arrest, jailing, and persecution the free-speech fighters were dramatizing and illuminating specific conditions needing change. Citizens observing the agitation were forced to address themselves to the condition. Many felt compelled to take the side of the IWW and further advance the call for change.

While the primary task of the free-speech fight was to win the right to use the streets, the method of gaining that right augmented other strategies in the rhetorical program of the IWW--a fact not overlooked by IWW rhetors. For example, the free-speech struggle strengthened working-class solidarity.[10] To the IWW solidarity was the power of a united working class, and the free-speech fight became an operational definition of the term. W. E. Trautmann, an IWW leader, confirmed this thinking: "We appeal to a candid world of workers to aid us in this struggle so that the corporations of the West and their city officials of Spokane can be given the lesson that more powerful than the agencies of oppression and brutal force is the power of the combined workers of this country."[11] Likewise, the IWW newspaper Solidarity observed: "By use of its weakest weapon--passive resistence--labor forced civic authorities to recognize a power equal to the state."[12]

Equally basic to the ideology of the IWW was the doctrine of the class struggle. This doctrine too was rhetorically advanced through the polarizing effect of the free-speech struggle. Whereas the class-struggle rhetoric argued the existence of a breach between the working class and the employing class,

the free-speech fights illustrated and exacerbated that breach.

Insight into this rhetorical tactic may be gained by applying a strategy identified by James F. Klumpp in his analysis of the rhetoric of the 1968 revolt at Columbia University: "polar-rejective identification."[13] According to Klumpp "the strategy's success rests on the rejection of established leadership in a polarized environment." In such a setting an audience (or community) is forced to choose between the establishment and the agents of agitation. "With such a choice forced on the community," Klumpp observed, "the radicals could succeed without the necessity of pulling the community toward their position but by creating a situation in which the [establishment] drove the community toward the radical alternative."[14] Bowers and Ochs similarly observed that polarization occurs "by forcing such a strong negative reaction to the emotionally charged flag issue [the denial of free speech and police brutality] that condemnation of flag individuals and groups [municipal officials] would follow." "A choice would be forced," they concluded; neutrality would be most difficult."[15] The polarization is completed when the "radicals" accurately predict the establishment's reactions and the establishment is rejected.

Although Wobbly victories in the free-speech fights did not necessarily spring from a complete rejection of municipal establishments, most factors of the polar-rejective identification strategy were present. During the free-speech struggles IWW rhetors advanced the polarization strategy with an invective campaign labeling as lawbreakers those who would deny free speech to the working class.

The following statement is typical of such arguments: "There is one good thing about this gag-law business; it is causing all thinking working people to see that the 'liberties' of the United States constitution do not exist, and that a working man or woman has no rights that his employer need respect, unless the workers have the power to enforce respect. . . . The employer agents are the ones who have passed the Spokane gag law, and it is, of course, the employing class generally who are responsible for this."[16]

The rhetoric took advantage of every act of brutality on the part of the law-enforcement officers and vigilantes, thus further intensifying the polarization. Many articles and photographs appearing in the IWW press vividly recounted the brutality visited upon free-speech advocates by forces of law and order.

Weapons used against the free-speech fighters were usually as brutal as the victims claimed. Spokane authorities incarcerated free-speech advocates in drafty, unheated buildings in the middle of winter. Prisoners were tortured in eight-by-six sweat boxes and returned to icy cells. Fresno prisoners were fed on bread and water and punished with bruising showers from 150-pound-pressure fire hoses.[17] San Diego prisoners were forced to strip, run a gauntlet of whip-and-blackjack-wielding men and, finally, to kiss the flag and sing the national anthem.[18]

The rhetorical value of polarization was demonstrated in every free-speech fight. The message was clear: The IWW had used nonviolence to gain First Amendment rights. The establishment had violated basic constitutional rights with brutality and inhumane treatment.

Faced with a polarization difficult to deal with, many persons hostile to the IWW were forced by conscience into a position of sympathy for the free-speech fighters. "Free speech became an instrument for possible martyrdom for the cause of economic justice and emancipation of the workers."[19] Liberal voices rose in defense of the IWW in the face of increasingly ugly police tactics. In Spokane civic leaders, respected clergymen, and many leading socialists gave sympathy and support to the cause. In Missoula, Senator Robert M. LaFollette, in town for a visit, spoke in support of the free-speech fighters.[20]

Perhaps the most vivid evidence of the impact of the IWW's strategy came in a report filed by Harrison Weinstock, special commissioner to the Governor of California and an avowed antagonist of the IWW. In part he admitted: "Your commissioner is frank to confess that when he became satisfied of the truth of the stories . . . it was hard for him to believe that he still was not sojourning in Russia, conducting his investigation there, instead of in this alleged 'land of the free and home of the brave.' Surely these American men who, as the overwhelming evidence shows, in large numbers assaulted with weapons in a most cowardly and brutal manner their helpless and defenseless fellows, were certainly far from 'brave' and their victims far from 'free.'"[21] Weinstock concluded with a statement that could well have come from the mouth of an IWW rhetor: "The question naturally arises, therefore, who are the greater criminals; who are the real anarchists; who are the real violators of the constitution; who are the real undesirables--these so-called unfortunate members of 'the scum of the earth,' or these presumably respectable members of society?"[22] No IWW soapboxer could have more effectively underscored the polarization of the class struggle.

The Wobbly Philosophy

While some historians attribute a purely pragmatic motive to the IWW and deny that it had any larger philosophical or libertarian motivation in defending free speech,[23] the free-speech fights it conducted did advance the cause of freedom of speech. In the first place, the free-speech struggles drew considerable public attention not only to the IWW and its ideology but also to basic First Amendment principles. As historian Philip Foner observed, the IWW was "dedicated to preserve a basic principle of American democracy--freedom of speech--when no other national organization existed to uphold this principle."[24] Indeed, the free-speech fights were initiated some ten years before the founding of the American Civil Liberties Union. Likewise, those who rallied to support the free-speech fighters--newspapers, socialist groups, townspeople, and even the illustrious Robert M. LaFollette--were defending not merely a radical labor organization but also a principle that was being systematically violated. While many found the association of IWW ideology with free speech a difficult concept to grasp (not unlike the recent Skokie, Illinois, experience with the American Nazi Party), the principle of free speech was nevertheless so basic a part of the doctrines and traditions of our government that the struggles could not be ignored.[25] Thus, by defending free speech for its own pragmatic purposes the IWW highlighted First Amendment principles for all to see and learn from.

Finally, the rhetoric itself advanced a clearly defined concept of freedom of speech. Following the arrest of Elizabeth Gurley Flynn for speaking in Paterson, New Jersey, the IWW protested in a telegram to President Woodrow Wilson: ". . . New Jersey denied the civic rights, the inalienable rights guaranteed to citizens,. . . New Jersey has violated the constitution under which the State was chartered. The Industrial Workers of the World proposes to fight this issue to reestablish the right of free speech and the right of free assembly."[26]

Such a motive was not only followed by the leadership but was proclaimed by the rank-and-file as well. Note, for instance, the position taken by a group of Minneapolis Wobblies: "Freedom of speech is a natural right and no man or set of men, no government . . . has the moral or constitutional right to prevent the exercise of the same."[27] Other Wobbly opinions foreshadowed the Holmes concept that truth can only come from a "free trade in ideas," only in the "competition of the marketplace."[28] For example, a Portland, Oregon, Wobbly wrote: " . . . the raggedest imbecile, if you please, has the right to give his fellow men the thoughts his Creator put in his brain. You do not know but that in the glacial movement of the ages his thoughts may turn out to be truth and yours the lie."[29] Likewise, Wobbly writer Mark Stone penned: "Belief in free speech is the conviction that bad ideas (if there is any such thing) need only complete freedom of expression of opposite ideas to render the bad ones futile, harmless, and ridiculous."[30]

One of the functions of the newspapers and other pieces of literature published by the IWW was to educate workers into whose hands they fell. The fact that newspaper writers for the IWW chose to present detailed, analytical articles on free speech evidences the movement's desire to communicate a clear freedom-of-speech doctrine. While it is impossible to ascertain the number of people within and without the IWW who read and learned from this literature, the fact remains that in the literature related to the free-speech fights was contained a consistent and philosophically sound doctrine of free speech.

Freedom of speech is as frequently taught by episodes of suppression as by textbooks used in civics classes. Such were the free-speech fights of the Industrial Workers of the World. Responding to the exigencies of legal suppression of the right to speak, the IWW developed its unique tactic of the free-speech fight. It was a successful rhetorical strategy and it was an object lesson in First Amendment principles. Labor historian Joseph Conlin accurately summed up the contributions of the free-speech fights: "The Wobblies have neither the benefit of historical remoteness, to romanticize their radical dissent, nor the appearance of respectability. Nevertheless, in a series of 'free speech fights'. . . during the decade following 1906, the I.W.W. stood boldly and steadfastly for the right to speak unhindered when most other Americans were either indifferent to the right or downright hostile to it. To this facet of Wobbly history, Americans owe a real debt, and historians some attention."[31]

Endnotes

[1]"A Call to Action," Industrial Worker, February 16, 1910, p.2.

[2]The notion of the "exigency" in the "rhetorical situation" is developed in Lloyd Bitzer, "The Rhetorical Situation," Philosophy and Rhetoric, I (January, 1968), 1-15.

[3]William Preston, Jr., Aliens and Dissenters: Federal Suppression of Radicals, 1903-1933 (New York: Harper Torchbooks; Harper & Row, publishers, 1963), p. 42.

[4]Vincent St. John, Industrial Unionism: The I.W.W. (Chicago: I.W.W. Publishing Bureau, n.d.), p.2; see also Melvyn Dubofsky, We Shall Be All: A History of the Industrial Workers of the World (Chicago: Quadrangle Books, 1969), pp. 105-06.

[5]Dubofsky, We Shall Be All, p. 174.

[6]Philip S. Foner, History of the Labor Movement in the United States, Volume IV: The Industrial Workers of the World, 1905-1917 (New York: International Publishers, 1965), pp. 172 ff.

[7]Joseph Ettor, Industrial Unionism the Way to Freedom (n.p.: I.W.W. Publication, n.d.), p. 18; see also, Terry W. Cole, "Labor's Radical Alternative: The Rhetoric of the Industrial Workers of the World" (unpublished Ph.D. dissertation, University of Oregon, 1974), pp. 82-88.

[8]Vincent St. John, Final Report of the United States Commission on Industrial Relations--Testimony, Vol. II, Sen. Doc. 415, 64th Cong., 1st sess., p. 1471; see also General Headquarters Bulletin, IWW, 72 (November 9, 1915), p. 2 in Government Exhibits, Transcript of Record in the case of U.S.A. vs. William D. Haywood, et al., I.W.W. Collection, Archives of Labor History and Urban Affairs, Wayne State University.

[9]Foner, Workers of the World, p. 182.

[10]Joseph R. Conlin, "The Wobblies: A Study of the Industrial Workers of the World Before World War I" (unpublished Ph.D. dissertation, University

of Wisconsin, 1966), p. 45.

[11]W. E. Trautmann, "The Horrors and Outrages of the Congo in Spokane," Industrial Worker, February 26, 1910, p. 4.

[12]Solidarity, March 19, 1910, p. 2; cited in Dubofsky, We Shall Be All, pp. 183-84.

[13]James F. Klumpp, "Challenge of Radical Rhetoric: Radicalization at Columbia," Western Speech, XXXVII (Summer, 1973), 146-56.

[14]Klumpp, p. 148.

[15]John Waite Bowers and Donovan J. Ochs, The Rhetoric of Agitation and Control (Reading, Mass.: Addison-Wesley Publishing Company, Inc., 1971), p. 27.

[16]"The Missoula Free Speech Fight," Industrial Worker, October 20, 1909, p. 2.

[17]Dubofsky, We Shall Be All, pp. 178-80; Foner, Workers of the World, pp. 179-81, 187.

[18]Harris Weinstock, Report of Harris Weinstock, Commissioner to Investigate the Recent Disturbances in the City of San Diego and the County of San Diego, California, to His Excellency Hiram W. Johnson, Governor of California (Sacramento: Superintendent of State Printing, 1912), 14-16.

[19]Paul L. Murphy, The Meaning of Freedom of Speech: First Amendment Freedoms From Wilson to FDR (Westport, Connecticut: Greenwood Publishing Company, 1972), p. 21.

[20]Joseph R. Conlin, Bread and Roses Too: Studies of the Wobblies (Greenwood, Connecticut: Greenwood Publishing Co., 1969), p. 77; Robert L. Tyler, Rebels of the Woods: The I.W.W. in the Pacific Northwest (Eugene, Oregon: University of Oregon Books, 1967), pp. 36-37; Foner, Workers of the World, p. 177.

[21]Weinstock, Report, pp. 16-17.

[22]Weinstock, p. 20.

[23]Dubofsky, We Shall Be All, p. 173.

[24]Foner, Workers of the World, p. 212.

[25]Murphy, The Meaning of Freedom of Speech, p. 21.

[26]General Headquarters, IWW, "Bulletin," December 10, 1915, p. 2, in Government Exhibits, Transcript of Record in the case of U.S.A. vs. William D. Haywood, et al., I.W.W. Collection, Archives of Labor History and Urban Affairs, Wayne State University.

[27]"Free Speech and Governmentalism," Industrial Worker, December 1, 1909, p. 4.

[28]Oliver Wendell Holmes, "Dissenting Opinion," Abrams vs. United States, 250 US 616 (1919).

[29]"Resolutions From Portland," Industrial Worker, December 1, 1909, p. 4.

[30]Mark Stone, "An Analysis of Free Speech," Industrial Worker, October 20, 1917, p. 3.

[31]Conlin, "The Wobblies," pp. 14[illegible]

TOWARD DEVELOPMENT OF AN EMPLOYEES' RIGHTS SCALE

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If you want to become a reporter for The Philadelphia Daily News or move into executive positions in any of the Knight-Ridder's chain, which boasts the largest circulation (3,725,000) of any newspaper group in the country, you must take a test that measures, among other things, your masculinity. Knight-Ridder is committed to a psychological assessment--a rarity in the newspaper industry but not in industry generally.[1] These tests are expected to reveal not only "masculine tendencies" but also motivation, sociability, and emotional stability according to test administrators Bryon, Hzrless, Schaeffer, Reid and Associates.

Ours is an age of behavioral science, which seeks to pry open the psyche and to predict such tendencies as one's likeliness to conform or deviate. The data gathered, of course, is filed.

The federal government, for example, disclosed that it has some nine hundred data banks containing 1.25 billion records with personal information about individuals. Reacting to employees' complaints about invasion of their privacy, the Senate's Government Committee has shown dismay over careless sharing of this information, and the AFL-CIO has mounted a drive to abolish lie detectors in the work setting.[2] New York state recently passed a law prohibiting employers from "requiring, requesting, suggesting, or knowingly permitting" employees or applicants to take or be subjected to lie-detector tests or voice analyzers.[3]

Management is not content to test and predict employees' tendencies to fit into the pyramid; it also feels the need to control. David W. Ewing, former editor of Management Thinking (a publication of the Harvard Business Review) has recently authored Freedom Inside the Organization: Bringing Civil Liberties to the Workshop. It is his considered opinion that free speech is resisted more stubbornly by management than any other concession it can make to employees. He suggests that the reason for high resistance is traceable to the fact that of all the freedoms speech and press are the most powerful because they lead to other freedoms.

Freedom may destroy conformity, routine, and control. Therefore, Ewing asserts, "What management fears most of all is the perceived threat to the hierarchy of power."[4] The conflict is an ancient one, rooted in the assumption that a leader is the thinker and the subordinate's task is to do and not to think. To challenge authority endangers the smooth functioning of the organization, so an understanding between the strong and the weak is necessary, just as is differentiation in function. Fortunately such aristocratic thinking has given way across the centuries to egalitarian stirrings, but the vestiges of the leader's right to manage and to be the sole voice of the organization is still with us.

Union formation, of course, is what happens when employees share their complaints and organize to articulate them. Moreover, organizational blunders such as the $750,000 spent by National Broadcasting Company on a logo to replace the peacock got out when employees spoke freely--as do cost overruns and Watergate slush funds. But employers too often prefer to dismiss those who speak freely. A. Ernest Fitzgerald, the Air Force cost analyst, for example, got fired after exposing nearly two billion dollars in cost overruns on a jet transportation system.

Employee Rights Ignored

Most organizational-climate studies fail to consider employee rights. If they are a part of any dimension, the questions certainly do not zero in on such dimensions as confidentiality, psychological or intelligence testing, blowing the whistle on illegal or unethical behavior, searching employees' desks, or personal grooming.[5]

One of the few chief executive officers to speak out boldly about employee privacy is Frank T. Cary, who became Board Chairman of International Business Machines in 1973.[6] In 1975 and again in 1977 IBM, in regular surveys of employee opinion, included questions about whether the employee feels that his or her manager and the corporation in general treat personal information in a confidential manner. Of a sample of more than 50,000 employees 85 per cent responded positively. In addition, in a special survey an IBM sample of 400 employees was compared with 2,000 employees from five other major companies. The IBM employees responded almost twice as favorably regarding their impression of the company's practices in handling personal information.[7] Guidelines developed by the IBM task force, the work of Alan Westin, Kenneth Walters, and previous surveys,[8] were utilized to develop a self-scoring instrument designed to measure employee perception of management's concern for employee rights.

The task of defining principles that are important in the development of items in an employee's-rights scale involves consideration of law, ethics, personnel-record-keeping costs, interpersonal relations, and preservation of the employing organization. IBM evolved "Four Principles of Privacy":

1. Individuals should have access to information about themselves in record-keeping systems. And there should be some procedure for individuals to find out how this information is being used.

2. There should be some way for an individual to correct to amend an inaccurate record.

3. An individual should be able to prevent information from being improperly disclosed or used for other than authorized purposes without his or her consent unless required by law.

4. The custodian of data files containing sensitive information should take reasonable precautions to be sure that the data are reliable and not misused.

To these four, three additional principles are added:

5. Employees should have opportunity to express concerns for the welfare of their own job and the organization at large without reprisal. In short, freedom of speech should not be abridged.

6. Employees should be able to express their individuality, identity, and to have some personal territory within the work space.

7. Employment or advancement should not be based upon sex, race, creed, age, or personal data irrelevant to the position.[9]

In Summary

Attention to employee rights is a neglected area of organizational concern. Governmental pressure, ethical consciousness, recent concerns for participative decision making in the place of work, and attention to the quality of work life, all coalesce to cause employers and employees to ask explicit questions about privacy and freedom of expression. Current measures of job satisfaction and work climate do not address this area. An Employees' Rights Scale has been developed under my direction to provide a measure of how well employees' rights are perceived to be practiced.

Such a scale may be used to raise the consciousness of management to changes in the law, to changing practices, to re-evaluation of policies, and to constitutional verities. Administration of such a scale might threaten an organization that seeks to live in the past; but for an organization that wants thinking and intellectually alert employees, such would be a measure of how well it was doing in communicating its intentions to foster policies congruent with constitutional rights.

At their worst, organizations demand unquestioning subservience whether the organization is right or wrong. Organizations at their best, as Chris Argyris argues, serve rather than undermine individualistic needs of their members.[10] The literature examined leads one to the impression that there most certainly is a need for raising the consciousness of managers and employees to protection of abuses of power by organizations. Assessing organizational policies and practices may be one step toward realization of a Bill of Employees' Rights.

The suggested scale follows:

Employees' Rights Scale

Instructions

This scale is designed to provide a measure of how concerned your organization appears to be regarding employee rights. Simply indicate, in the blank space provided, the degree to which you believe each of the statements to be true: 7 = Always True; 6 = Frequently True; 5 = Quite True; 4 = Commonly True; 3 = Somewhat True; 2 Slightly True; 1 = Never True.

There are no trick statements, nor do the statements indicate what in fact is true or untrue; rather the intent is to discover what you believe or feel to be true. If you do not know what in fact is true, indicate the degree in which you feel that the statement is true of the firm or organization where you are employed.

Upon completing the scale you will be told how to calculate your score. Proceed rapidly:

In my place of work . . .

_____ 1. An employee is told what is in one's file and what one is permitted to see.

_____ 2. Employees' conversations (live or by telephone) and meetings may not be taped or monitored without their knowledge and consent.

_____ 3. Old performance evaluations must be weeded out from an employee's file.

_____ 4. Personality and general intelligence tests are not permissible.

_____ 5. When an employee is away, his desk and personal office files may be opened only by someone in authority in urgent need of specific information important to the organization.

_____ 6.* Job applicants or employees are subjected to lie-detector or voice-stress-analyzers tests.

_____ 7. No employee information on file may be furnished to an outsider without the employee's consent or a court order.

_____ 8.* Mail addressed to an employee may be opened with out his/her permission.

_____ 9.* An employee who speaks publicly about alleged illegal behavior of

management will be terminated.

_____ 10.* The organization forbids or discourages employees from outside activities which are political or controversial.

_____ 11. The organization has a well-publicized bill of employee rights.

_____ 12. Employees' briefcases, purses, and bundles may be checked at times when organizational security is essential.

_____ 13. Employees may speak out publicly on issues of ethical or social responsibility even when they disagree with their organization's positions.

_____ 14.* The organization imposes unreasonable restrictions upon employees' dress and grooming.

_____ 15. Insulting and discourteous speech is rare between employees and management.

_____ 16.* Management wants to keep employees gagged.

_____ 17. Employees may post pictures of a personal, religious, or sexual nature if their work space is in a relatively private area.

_____ 18. Management actively pursues a policy of affirmative action in employment and promotion for minorities and women.

_____ 19.* Some males in positions of authority harass female employees with sexual trade-offs for their employment.

_____ 20. Management is not interested in an employee's personality style unless it is a genuine threat to the economic welfare of the organization.

_____ 21. My immediate superior treats personal information about employees in a confidential manner.

_____ 22. Employees have access to information about themselves in record-keeping systems.

_____ 23. Employees can find out how records about them are being used.

_____ 24. Employees may correct or amend an inaccurate record.

_____ 25. An individual employee can prevent personal information from being used or disclosed without his/her consent.

_____ 26. The custodians of files containing sensitive information take reasonable precautions to be sure that the data are reliable and not misused.

_____ 27. Performance appraisals are conducted in a professional, confidential manner.

_____ 28. An employee is expected to review the annual written evaluation of his or her work and may add comments if so desired.

_____ 29.* There are no communication channels through which an employee may confidentially submit complaints, comments, or questions.

_____ 30. There is a workable system by which an employee may appeal the actions of his immediate superior to bring the matter to the attention of higher management.

_____ 31.* Pre-employment background information such as information from outside credit agencies is collected.

_____ 32. When references on previous employment or education are checked, it is done with the knowledge and consent of the subject.

_____ 33.* Personality testing is used during the hiring process.

_____ 34.* Medical information with respect to previous emotional or mental problems is requested in the pre-employment questionnaire or interview.

_____ 35.* Employment applications request such items as date of birth, employment of spouse, relatives employed, type of military discharge, and previous addresses.

_____ 36.* Records are maintained on employees suspected of breaches of internal security.

_____ 37.* Social-security numbers are used on personal identification badges, cards, and/or medical records.

_____ 38. The public-relations department checks with employees before publicizing promotions and other achievements.

_____ 39. Medical records are used for medical purposes only and are not part of the promotion or placement process except in cases of work-related restrictions.

_____ 40.* The employee's manager may check with the Payroll Department concerning an employee's deductions for such things as savings bonds, charitable contributions, and stock-purchase plan.

_____ 41.* Information about an employee is easily released to outside agencies.

_____ 42. Employees have access to their data because records are located at the employee's local plant rather than at a distant corporation headquarters.

_____ 43.* Record keeping is extensive and bureaucratic.

_____ 44. Management is equally concerned about ethics as it is productivity.

_____ 45. Employees trust management's efforts to protect their privacy.

Scoring

Reverse the scoring on items that have asterisks: 6, 8, 9, 10, 14, 16, 19, 29, 31, 33, 34, 35, 36, 37, 40, 41, and 43. Thus, a score of seven should be reversed to one, a score of six reversed to two, five reversed to three, four stays the same, three reversed to five, two reversed to six, and one is reversed to seven.

Next take the sum of all 45 items. The following scale provides a range from high organizational concern for employee rights to extreme transgression.

Scale for Interpretation

261 - 315--protector of employee rights.
216 - 260--sensitive to employee rights.
171 - 215--moderately concerned about employee rights.
136 - 170--chilling climate to employee expression.
91 - 135--intolerant to employee dissent and privacy.
0 - 90--censor of employee freedom and transgressor to privacy.

Endnotes

[1]Francis Pollock, "Knight-Ridder Wants to Know the Real You," Columbia Journalism Review, January-February, 1978; pp. 25-28.

[2]David W. Ewing, "Employees' Rights," Society, November-December, 1977; pp. 104-111.

[3]Berkeley Rice, "The New Truth Machines," Psychology Today, Vol. 12 (June, 1978); p. 78.

[4]Rice, p. 104.

[5]Edward E. Lawler III, "Control Systems in Organizations" and Edwin A. Locke, "The Nature and Cause of Job Satisfaction," in Marvin D. Dunnette (ed.) Handbook of Industrial and Organizational Psychology (Chicago: Rand McNally, 1976); pp. 1247-1350.

[6]Frank T. Cary, "Privacy," in William I. Gorden and John Miller, Speak Up For Business: Career Communication Development (Dubuque, Iowa: Kendall-Hunt, 1977); pp. 247-251.

[7]J. R. Isaacson, director of employment and employee development. Personal letter to the author, April 28, 1978. Also see W. E. Burdick, "IBM: The Managing of Employee Personal Information and Employee Privacy," Presentation to Privacy Protection Study Commission Employment and Personal Record Keeping Practices Hearing: Washington, D.C., December 10, 1976.

[8]Kenneth Walters, "Employee Freedom of Speech," Industrial Relations, February, 1976; pp. 20-43; Wilbur J. Osborne and William I. Gorden, "A Freedom of Speech Survey of Student Opinion in a Basic Speech Course," Free Speech Yearbook, 1970, Thomas L. Tedford (ed.) (New York: Speech Communication Association, 1970), pp. 52-62; Alan F. Westin, Privacy and Freedom (New York: Atheneum, 1967); Vance O. Packard, The Naked Society (New York: D. McKay Co., 1964); and John H. F. Shattuck, Rights of Privacy (Stokie, Illinois: National Textbook Co., 1977).

[9]W. E. Burdick.

[10]Chris Argyris, Personality and Organization (New York: Harper-Row, 1957).

FREEDOM OF SPEECH BIBLIOGRAPHY: JULY 1977--JUNE 1978 ARTICLES, BOOKS, NEWSLETTERS, COURT CASES, AND DISSERTATIONS

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(This bibliography is generally limited to materials published between July 1977 and June 1978. Bibliographies for previous years appear in earlier issues of the Free Speech Yearbook.)

Articles

Abrams, R. M., "Primary and Secondary Characteristics in Discrimination Cases." Villanova Law Review, 23:35-67 (November, 1977).

"Academic Freedom in the High School Classroom." Journal of Family Law, 15:706-31 (1976-1977).

Anastaplo, G., "Meaning of Freedom of Speech: First Amendment Freedoms From Wilson to FDR: A Review of Murphy." Southwestern University Law Review, 9:273-7 (1977).

"Arizona's Ban on Attorney Advertisements Is Not Subject to Attack Under the Sherman Act but Violates the First Amendment by Restraining Truthful Advertisements Regarding the Availability and Terms of Routine Legal Services." University of Cincinnati Law Review, 47:1029-36 (1978).

Armor, J. C. and P. L. Marcus, "Bloodless Revolution of 1976." American Bar Association Journal, 63:1108-12 (August, 1977).

Arvidson, Cheryl, "S.1437: Son of a Menace." The Quill, 66:2 (February, 1978), 21-23.

"Attorney Advertisement Protected by First Amendment." Loyola Law Review, 24:164-71 (Winter, 1978).

"Attorney Advertising: Bates' (Bates & O'Steen v. State Bar of Arizona 97 Sup Ct 2691) Impact on Regulation." South Carolina Law Review, 29:457-573 (March, 1978).

"Attorney Advertising Is Commercial Speech Protected by the First Amendment." Maryland Law Review, 37:350-79 (1977).

"Attorney's Rights Under the Code of Professional Responsibility: Free Speech, Right to Know, and Freedom of Association." Washington University Law Quarterly, 1977:687-727 (Fall, 1977).

Baker, C. E., "Commercial Speech: A Problem in the Theory of Freedom." Iowa Law Review, 62:1-56 (October, 1976).

Baker, D. I., "Antitrust in the Sunshine." St. Louis University Law Journal, 21:347-57 (1977).

Baker, W. R., "Do Lawyers Have a First Amendment Right to Solicit?" American Bar Association Journal, 64:364-ff (March, 1978).

Barrow, R. L., "Presidential Debates of 1976: Toward a Two Party Political System." University of Cincinnati Law Review, 46:123-49 (1977).

"Bates and O'Steen v. State Bar of Arizona (97 Sup Ct 2691): From the Court to the Bar to the Consumer." Loyola University Law Journal (Chicago), 9:477-505 (Winter, 1978).

Bates v. State Bar of Arizona (97 Sup Ct 2691): Attorney Fee Advertising--Pandora's Box or Public Boon?" Ohio North Law Review, 5:153-66 (January, 1978).

Belair, R. R., "Agency Implementation of the Privacy Act and the Freedom of Information Act: Impact on the Government's Collection, Maintenance and Dissemination of Personally Identifiable Information." The John Marshall Journal of Practice and Procedure, 10:465-512 (Spring, 1977).

BeVier, L. R., "First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle." Stanford Law Review, 30:299-358 (January, 1978).

Bezanson, R. P., "New Free Press Guarantee." Virginia Law Review, 63:731-88 (June, 1977).

Blanchard, Margaret H., "The Fifth Amendment Privilege of Newsman George Bundick." Journalism Quarterly, 55:1 (Spring, 1978), 39-46+

Blasi, V., "Checking Value in First Amendment Theory." American Bar Association Research Journal, 1977:521-649 (Summer, 1977).

"Border Searches of International Letter Mail." University of Colorado Law Review, 49:103-26 (Fall, 1977).

Bowser, A., "Delimiting Religion in the Constitution: A Classification Problem." Valparaiso University Law Review, 11:163-226 (Winter, 1977).

Brent, A. S., "Right to Religious Education and the Constitutional Status of Denominational Schools." Saskatchewan Law Review, 40:239-67 (1975--1976).

"Broadcasters' News-Gathering Rights Under the First Amendment: Garrett v. Estelle (556 F 2d 1274)." Iowa Law Review, 63-724-49 (Fall, 1978).

Campaign Reform in Michigan: Removing the Tarnish and the Taint." University of Detroit Journal of Urban Law, 54:513-52 (Winter, 1977).

Campbell, Louis J., III, "From Small Acorns Mighty Oaks Grow: The Legislatures and Free Speech in Colonial Connecticut and Rhode Island." Free Speech Yearbook, 1977. Falls Church, Virginia: Speech Communication Association (1978), 3-24.

"Censorship of Violent Motion Pictures: A Constitutional Analysis." Indiana Law Review, 53:381-98 (1977-1978).

Center, Don, "The Labadie Collection: A Research Report." Free Speech Yearbook, 1977. Falls Church, Virginia: Speech Communication Association (1978), 87-90.

Child, B., "Trends in the United States Supreme Court's Use of the Ripeness Doctrine in Free Speech and Association Cases: A Comparison With Canadian Trends." Case Western Reserve Journal of International Law, 10:415-68 (Spring, 1978).

"Child Custody: Best Interests of Children vs. Constitutional Rights of Parents." Dickinson Law Review, 81:733-54 (Summer, 1977).

"'Chipping Away at the First Amendment': Newspapermen Must Disclose Sources." Akron Law Review, 7:129-49 (Fall, 1973).

"Church and State" The Past, Present, and Future of State Aid to Parochial Schools." Southwestern University Law Review, 9:1211-46 (1977).

Clor, H., "Public Morality and Free Expression: The Judicial Search for Principles of Reconciliation." Hastings Law Journal, 28:1305-13 (July, 1977).

Coase, R. H., "Advertising and Free Speech." Journal of Legal Studies, 6:1-34 (January, 1977).

Cohn, R. G., "Judicial Discipline in Illinois--A Commentary on the Judge Edward (Edward, In re Illinois Cts. Comm. No. 77-CC-1) Decision." Chicago Bar Record, 59:200-4+ (January--February, 1978).

Coleman, D. A., "Equal Access and the First Amendment: The Debate Behind 'Speech or Debate.'" Hastings Constitutional Law Quarterly, 4:35-66 (Winter, 1977).

Collins, E. L., and J. D. Drushal, "Reaction of the State Courts to Gertz v. Robert Welch, Inc." Case Western Reserve Law Review, 28:306-43 (Winter, 1978).

Collins, R., "Human Being and Citizen: Essays on Virtue, Freedom, and the Common Good; G. Anastaplo's Review. Passion Magnanimity, and the Rule of Law [A Reply]; G. Anastaplo." Southern California Law Review, 50:337-50, 351-73 (January, 1977).

"Commercial Speech, Blockbusting, and the First Amendment: Linmark Associates, Inc. v. Township of Willingboro (97 Sup Ct 1614)." Capital University Law Review, 7:271-93 (1977).

"Commercial Speech: A Constitutional Protection for Advertising Sales of Residential Property." Loyola Law Review, 23:1038-45 (Fall, 1977).

"Commercial Speech Doctrine and the First Amendment." Tulsa Law Journal, 12:699-730, (1977).

Connolly, W. B. and J. C. Fox, "Employer Rights and Access to Documents Under the Freedom of Information Act." Fordham Law Review, 46:203-40 (November, 1977).

Conley, P. T. and R. Cunha, "State Aid to Rhode Island's Private Schools: A Case Study of Dicenso v. Robinson." Catholic Lawyer, 22:329-43 (Autumn, 1976).

"Confusion Worse Confounded: The Supreme Court and Obscenity Law." New York University Law Review, 52:820-59 (October, 1977).

"Constitutional Aspects of Removing Books From School Libraries." Kentucky Law Journal, 66:127-49 (1977--1978).

"Constitutional Law: Bates v. State Bar of Arizona (97 Sup Ct 2691); The Legal Profession Goes Public: Lawyers' Constitutional Right to Advertise." UMKC Law Review, 46:317-31 (Winter, 1977).

"Constitutional Law--A Comparison of Missouri and Federal Standards for State Aid to Non-public Schools." Missouri Law Review, 42:618-25 (Fall, 1977).

"Constitutional Law and the Criminal Trial: Exclusion of the Press From Voir Dire." Arkansas Law Review, 32:132-8 (Spring, 1978).

"Constitutional Law--First Amendment--Freedom of Religion--State Aid to Parochial Schools." New York Law School Law Review, 22:1022-34 (1977).

"Constitutional Law--First Amendment--Libel--Public Figures." New York Law School Law Review, 22:1060-70 (1977).

"Constitutional Law--First Amendment--Right of the Media to Gather News in Prisons." Suffolk University Law Review, 11:1354-66 (Summer, 1977).

"Constitutional Law--Free Press Versus Fair Trial--Prior Restraint to Protect Accused's Sixth Amendment Rights Is Unconditional and Violative of First Amendment Rights." Howard Law Journal, 20:537-50 (1977).

"Constitutional Law--Freedom of the Press--Fair Trial--Gag Orders." New York Law School Law Review, 22:764-85 (1977).

"Constitutional Law: Whitehorn v. State [(Okla.) 561 P 2d 539]: Peyote and Religious Freedom in Oklahoma." American Indian Law Review, 5:229-38 (Summer, 1977).

"Constitutional Privilege to Republish Defamation." Columbia Law Review, 77:1266-84 (December, 1977).

"Constitutional Right to Know." Hastings Constitutional Law Quarterly, 4:109-63 (Winter, 1977).

"Constitutionality of Punitive Damages in Libel Actions." Fordham Law Review, 45:1382-428 (May, 1977).

"Consumers' Right to Know: An Analysis of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (96 Sup Ct 1817) and the Effect of the First Amendment Right to Receive Information on Lawyers' Advertising." New England Law Review, 12:991-1020 (Spring, 1977).

"Content Neutrality." Case Western Reserve Law Review, 28:456-92 (Winter, 1978).

"Corporate Political Action Committees: Effect of the Federal Election Campaign Act Amendments of 1976." Catholic University Law Review, 26:756-93 (Summer, 1977).

"Corporate and Union Political Contributions and Expenditures Under 2 U.S.C. Section 441b: A Constitutional Analysis." Utah Law Review, 1977:291-314 (1977).

Coven, M., "First Amendment Rights of Policymaking Public Employees." Harvard Civil Rights Law Review, 12:559-84 (Summer, 1977).

Cox, M. P., "Walk Through Section 552 of the Administrative Procedure Act: The Freedom of Information Act; The Privacy Act; and the Government in the Sunshine Act." University of Cincinnati Law Review, 46:969-87 (1978).

"Criminal Penalties for Harassment." Pacific Law Journal, 9:217-48 (January, 1978).

Cripe, C. A., "Religious Freedom in Prisons." Federal Probation, 41:31-5 (March, 1977).

Crofts, T. H., Jr., "Texas Restrictions on Political Campaign Contributions and Expenditures." St. Mary's Law Journal, 9:31-52 (1977).

"Culver v. Secretary of the Air Force (599 F 2d 622): Restriction of Servicemen's Individual Freedoms Abroad for Foreign Policy Reasons." William and Mary Law Review, 19:119-39 (Fall, 1977).

Czerniejewski, Halina J., "Your Newsroom May Be Searched." The Quill, 66:7 (July--August, 1978), 21-25.

Danzig, R., "How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion." Supreme Court Review, 1977:257-74 (1977).

"Defamation--Corporation Held a 'Person' Subject to the Gertz Test for Determining Liability in Defamation Actions." Fordham Law Review, 46:1287-300 (May, 1978).

"Defamation--An Injunction May Issue Against Libelous Speech Where the Public's Interest in Its Content Is Substantially Outweighed by the Potential Harm to the Victim." Temple Law Quarterly, 50:926-39 (1977).

Delgado, R., "God, Galileo, and Government: Toward Constitutional Protection for Scientific Inquiry." Washington Law Review, 53:349-404 (May, 1978).

Delgado, R., "Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment." Southern California Law Review, 51:1-98 (November, 1977).

"Demise of the Public Figure in Defamation Cases and the Ascent of a Responsible Press." DePaul Law Review, 26:863-73 (Summer, 1977).

Denniston, Lyle, "Without a Champion." The Quill, 66:8 (September, 1978), 23-26.

"Developing Standards of Care After Time, Inc. v. Firestone (96 Sup Ct 958); Experimentation Is Needed." Mercer Law Review, 29:841-60 (Spring, 1978).

"Developments Under the Freedom of Information Act--1976." Duke Law Journal, 1977:532-64 (May, 1977).

"Devil and the D. A.: The Civil Abatement of Obscenity." Hastings Law Journal, 28:1329-58 (July, 1977).

Dillard, I., "Mr. Justice Black and In re Anastaple." Southwestern University Law Review, 9:953-75 (1977).

"Disclosure and Individual Rights: Influencing the Legislative Process Under the Political Reform Act of 1974." Pacific Law Journal, 8:939-76 (July, 1977).

"Domestic Intelligence Informants, the First Amendment and the Need for Prior Judicial Review." Buffalo Law Review, 26:173-208 (Fall--Winter, 1976--1977).

"Domestic Relations: Balancing State Law Assurances of Confidentiality in Adoption Proceeding Against First and Sixth Amendment Guarantees." Howard Law Journal, 21:277-87 (1978).

Douglas, C. H., "Broadcast Media: Whose Message?" Trial, 14:26-30+ (May, 1978).

Eades, R. W., "Control of Seditious Libel as a Basis for the Development of the Law of Obscenity." Akron Law Review, 11:29-58 (Summer, 1977).

Eckhardt, W. L., Jr. and A. D. McKey, "Caldero v. Tribune Publishing Co. [(Idaho) 562 P 2d 791]: Substantive and Remedial Aspects of First Amendment Protection for Reporter's Confidential Sources." Idaho Law Review, 14:21-142 (Fall, 1977).

Eichbaum, J., "Antagonism Between Freedom of Speech and Seditious Libel." Hastings Constitutional Law Quarterly, 5:445-49 (Winter, 1978).

Eisenberg, R., "Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication." New York University Law Review, 52:36-171 (April, 1977).

Elman, P., "Advertising and the First Amendment." Food Drug Law Cosmetic Law Journal, 33:12-21 (January, 1978).

Elman, P., "New Constitutional Right to Advertise." American Bar Association Journal, 64:206-10 (February, 1978).

Emerson, T. I., "Colonial Intentions and Current Realities of the First Amendment." University of Pennsylvania Law Review, 125:737-60 (April, 1977).

"Eminent Domain: Constitutional Problems in the Taking of Church Lands." Oklahoma Law Review, 31:191-9 (Winter, 1978).

"Erosion of Commercial Speech--The Right to Know and the Informed Consumer." DePaul Law Review, 27:134-45 (Fall, 1976).

Eshelman, David, "Freedom of Speech Bibliography." Free Speech Yearbook, 1977. Falls Church, Virginia: Speech Communication Association (1978), 103-120.

"Establishment Clause Neutrality and the Reasonable Accommodation Requirement." Hastings Constitutional Law Quarterly, 4:901-34 (Fall, 1977).

"Ethics--Advertising by Attorneys." Wake Forest Law Review, 14:169-72 (Fall, 1978).

"Executive Privilege and the Freedom of Information Act: The Constitutional Foundation of the Amended National Security Exemption." Washington University Law Quarterly, 1976:609-66 (Fall, 1976).

Fahringer, H. P., "Charting a Course From the Free Press to a Fair Trial." Suffolk University Law Review, 12:1-15 (Winter, 1978).

Fahringer, H. P., "Obscenity. The Defense of an Obscenity Prosecution." Trial, 14:31-7 (May, 1978).

Fager, Christopher, "The Emerging Student Press." Update, 2:1 (Winter, 1978), 23-26.

"Fair Trial/Free Press: The Court's Dilemma." Washburn Law Journal, 17:125-45 (Fall, 1977).

"Family Viewing Hour: An Assault on the First Amendment?" Hastings Constitutional Law Quarterly, 4:935-89 (Fall, 1977).

"FCC--Constitutional Right to Free Speech--Limp Libidinal Language." Marquette Law Review, 61:534-43 (Spring, 1978).

"Federal 'Government in the Sunshine Act': A Public Access Compromise." University of Florida Law Review, 29:881-916 (Fall, 1977).

"Federal Lobbying Disclosure Legislation." American University Law Review, 26:972-1017 (Summer, 1977).

Fenner, G. M. and J. L. Koley, "Rights of the Press and the Closed Court Criminal Proceeding." Nebraska Law Review, 57:442-522 (1978).

Finer, J. J., "*Mens Rea*, the First Amendment, and Threats Against the Life of the President." Arizona Law Review, 18:863-902 (1976).

Fink, N. H., "Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values." Catholic University Law Review, 27:207-62 (Winter, 1977).

"First Amendment: A Blockbuster's Best Friend." UMKC Law Review, 46:425-53 (Spring, 1978).

"First Amendment Controls the Nature of Restrictions That a City Can Impose on the Use of Political Posters." Kansas Law Review, 26:132-45 (Fall, 1977).

"First Amendment Exception to Copyright: A Proposed Test." Wisconsin Law Review, 1977:1158-92 (1977).

"First Amendment Guarantee of a Free Press Protects Against Compelled Disclosure of a Journalist's Exercise of Editorial Control and Judgment." Vanderbilt Law Review, 31:357-87 (March, 1978).

"First Amendment--Labor Law--Labor Management Reporting and Disclosure Act--Section 101(a) (4)--Employer-Funded Suits." Dequesne Law Review, 16:431-41 (1977--1978).

"First Amendment Limitations on Public Disclosure Actions." University of Chicago Law Review, 45:180-217 (Fall, 1977).

"First Amendment: Media's Broadcast of Performer's 'Entire Act' Not Privileged." Loyola Law Review, 24:111-16 (Winter, 1978).

"First Amendment Problems in Punishing Political Threats." Connecticut Law Review, 9:304-10 (Winter, 1977).

"First Amendment Protection Extended to Price Advertising by Attorneys." Tulane Law Review, 52:414-21 (Fall, 1978).

"First Amendment Protects Attorneys' Right to Advertise Fixed Prices for Routine Legal Services." Texas Tech Law Review, 9:295-311 (Winter, 1977--1978).

"First Amendment Restrictions on the FTC's Regulation of Advertising." Vanderbilt Law Review, 31:349-73 (March, 1978).

"First Amendment Rights of the Broadcast Licensee and the Public Interest in Entertainment Programming." Washburn Law Journal, 17:262-89 (Winter, 1978).

"First Amendment Rights and Teacher Dismissal: A Survey." Ohio North Law Review, 4:392-424 (1977).

"First Amendment Rights Are Not Violated by a Jury Instruction Permitting a Jury to Consider Evidence of Pandering in Circumstances of Production, Distribution, and Sale in a Determination of Obscenity." University of Detroit Journal of Urban Law, 55:458-74 (Winter, 1978).

"First Amendment and Section 7 of the National Labor Relations Act: A Union's Right to Picket in the Privately Owned 'Public' Forum." University of Toledo Law Review, 8:437-71 (Winter, 1977).

"First Amendment Theory Applied to the Right of Publicity." Boston College Law Review, 19:277-94 (January, 1978).

Fleming, J. G., "Retraction and Reply: Alternative Remedies for Defamation." University of British Columbia Law Review, 12:25-31 (1978).

Flory, Joyce, "Implications of Herbert Marcuse's Theory of Freedom for Freedom of Speech." Free Speech Yearbook, 1977. Falls Church, Virginia: Speech Communication Association (1978), 55-64.

Forkosch, M.D., "Religion, Education, and the Constitution--A Middle Way." Loyola Law Review, 23:617-60 (Summer, 1977).

Frank, J. P., "Hugo L. Black: Free Speech and the Declaration of Independence." University of Illinois Law Forum, 1977:577-629 (1977).

"Free Exercise Clause, the NLRA, and Parochial School Teachers." University of Pennsylvania Law Review, 126:631-72 (January, 1978).

"Free Exercise of Religion--Application of Sherbert Test to Prohibit Snake Handling During Public Worship." Kansas Law Review, 25:585-93 (Summer, 1977).

"Free Speech Right to Know--Limit of School Board's Discretion in Curricular Choice--Public School Library as Marketplace of Ideas." Case Western Reserve Law Review, 27:1034-55 (Summer, 1977).

"Freedom of Expression and the Constitutional Privilege to Defame." Land & Water Law Review, 12:753-63 (1977).

"Freedom of Expression--Zoning--Adult Entertainment Districts." New York Law School Law Review, 22:753-63 (1977).

"Freedom of Information Act: 1974 Amended Time Provisions Interpreted." University of Miami Law Review, 32:212-27 (December, 1977).

"Freedom of Information Act: A Survey of Litigation Under the Exemptions." Mississippi Law Journal, 48:784-817 (September, 1977).

"Freedom of Religion and Science Instruction in Public Schools." Yale Law Journal, 87:515-70 (January, 1978).

"Freedom of Speech and Association--Government Employees." Boston College Industrial & Commercial Law Review, 18:782-804 (April, 1977).

"Freedom of Speech: Evolution of the Enlightenment Function." Mercer Law Review, 29:811-20 (Spring, 1978).

"Freedom of Speech When Confronted by a Hostile Audience." New York Law School Law Review, 22:324-39 (1976).

Friedman, J. M., "Federal Fetal Experimentation Regulations: An Establishment Clause Analysis." Minnesota Law Review, 61:961-1005 (June, 1977).

Friedman, Mel, "A New Communications Act: The Debate Begins." Columbia Journalism Review, XVII:3 (September/October, 1978), 40-43.

"FTC v. Simeon Management Corporation (532 F 2d 708): The First Amendment and the Need for Preliminary Injunctions of Commercial Speech." Duke Law Journal, 1977:489-511 (May, 1977).

"Gag Orders on the Press: A Due Process Defense to Contempt Citations." Hastings Constitutional Law Quarterly, 4:187-218 (Winter, 1977).

Geller, Henry and Gregg Young, "Family Viewing: An FCC Tumble From the Tightrope." Journal of Communication, 27:2 (Spring, 1977), 193-201.

Goldberger, D., "Skokie: The First Amendment Under Attack by Its Friends." Mercer Law Review, 29:761-72 (Spring, 1978).

Goldfarb, Ronald L., "Does an Article Have a Legal 'Right to Life'?" Columbia Journalism Review, XVII:1 (May/June, 1978), 57.

Goldman, R. L. "Doctrine of Worthier Speech: Young v. American Mini Theatres, Inc. (96 Sup Ct 2440)." St. Louis University Law Journal, 21:281-307 (1977).

Goodwin, Alfred T. and Lynn Taylor, "Freedom of Press on Trial." Update, 2:1 (Winter, 1978), 4-8+.

Gordon, N. A., "Constitutional Right to Candidacy." Kansas Law Review, 25:545-71 (Summer, 1977).

"Government in the Sunshine Act: A Danger of Overexposure." Harvard Journal

on Legislation, 14:620-50 (April, 1977).

Greenawalt, K., "Constitutional Limits on Aid to Sectarian Universities." The Journal of College and University Law, 4:177-86 (Spring, 1977).

Gross, Norman, "Search and Privacy in the Schools." Update, 2:2 (Spring, 1978), 28-31.

Halperin, M. H. and D. M. Hoffman, "Secrecy and the Right to Know." Law & Contemporary Problems, 40:132-65 (Summer, 1976).

Hart, Jack R., "The Case of Jay Shelledy and His Controversial Claim to Newsmen's Privilege." The Quill, 66:2 (February, 1977), 24-29.

Hartenberger, Karen S., "Sex, Violence, and the FCC." Public Telecommunications Review, 5:5 (November/December, 1977), 37-40. See also 6:2 (March/April, 1978), 34-37.

Haun, Martha Womack, "Spinoza: On Freedom of Thought and Speech." Free Speech Yearbook, 1977. Falls Church, Virginia: Speech Communication Association (1978), 47-54.

Hentoff, N., "Covering a Hustler: Media Watch." Civil Liberties Review, 4:50-4 (July/August, 1977).

Hidayatullah, M., "Thoughts on Obscenity." Southern Illinois University Law Journal, 1977:283-98 (December, 1977).

Hinchey, J. W., "First Amendment and the Delivery of Legal Services." American Bar Association Journal, 63:945-50 (July, 1977).

Hogue, L. L., "Regulating Obscenity Through the Power to Define and Abate Nuisances." Wake Forest Law Review, 14:1-49 (Fall, 1978).

Howard, D. C., J. T. Grisso and R. Neems, "Publicity and Juvenile Court Proceedings." Clearinghouse Review, 11:203-11 (July, 1977).

Hoyt, James L., "Cameras in the Courtroom." Public Telecommunications Review, 6:3 (May/June, 1978), 28-34.

Hoyt, James L., "Courtroom Coverage: The Effects of Being Televised." Journal of Broadcasting, 21:4 (Fall, 1977), 487-495.

Hudson, C. M. and B. Werther, Jr., "Section 8 (c) and Free Speech." Labor Law Journal, 28:608-14 (September, 1977).

"Human Cannonball and the Press." Louisiana Law Review, 38:619-28 (Winter, 1978).

Hunsaker, D. M., "Adequate Breathing Space in a Poisonous Atmosphere: Balancing Freedom and Responsibility in the Open Society." Duquesne Law Review, 16:9-44 (1977-1978).

"Hutchins v. Texas Rehabilitation Commission [(Texas) 544 S W 2d 802]: Public and Private Access to State Records." South Texas Law Journal, 18:591-7 (1977).

"Impending Federalization of Missouri Defamation Law." Missouri Law Review, 43:270-309 (Winter, 1978).

"In Search of the Corporate Private Figure: Defamation of the Corporation." Hofstra Law Review, 6:339-60 (Winter, 1978).

"'Initiation' Requirement of the Fairness Doctrine" Representative Patsy Mink (59 F C C 2d 987)." Ohio State Law Journal, 38:219-37 (1977).

"Inside the Great Campaign Finances Case of 1976: A Conversation [of CLR Reporter] With Ira Glasser." Civil Liberties Review, 4:8-19 (1977).

Isbell, F., "Dissidents in the Federal Government." Civil Liberties Review, 4:72-5 (September/October, 1977).

Jamison, David L., "Parliamentary Confidentiality and Free Speech: A Legal View." Free Speech Yearbook, 1977. Falls Church, Virginia: Speech Communication Association (1978), 35-46.

Jones, R. H. and W. E. Findler, "Freedom of Information Act in Military Aircrash Cases." Journal of Air Law and Commerce, 43:535-53 (1977).

"Jones v. North Carolina Prisoners' Labor Union (97 Sup Ct 2532): A Threat to Unionization in Prisons." New England Journal on Prison Law, 4:157-71 (Fall, 1977).

Kancelbaum, J. J., "Shifting Currents in the Narrow Channel of State Aid to Parochial Schools." Ohio State Law Journal, 38:757-82 (1977).

Kelley, D. M., "Deprogramming and Religious Liberty." Civil Liberties Review, 4:23-33 (July/August, 1977).

Kelly, Cynthia A., "The Struggle for a Free Press." Update, 2:1 (Winter, 1978), 16-17.

Knopf, Terry Ann, "Camera Coverage on Trial." The Quill, 65:10 (November, 1977), 21-24.

Kotch, Jonathan B., "The FCC and the First Amendment Facade: A Rejoinder." Public Telecommunications Review, 6:2 (March/April, 1978), 34-37.

"Labor Law--The Exclusivity Principle in the Public Employment Sector and First Amendment Rights." New York Law School Law Review, 23:132-50 (1977).

"Labor Law--Religious Discrimination--Accommodation of Refusal to Pay Dues in an Agency Shop Because of Religious Beliefs." Wayne Law Review, 23:1171-85 (March, 1977).

Larson, M. R. and J. P. Murphy, "Nebraska Press Association v. Stuart (96 Sup Ct 2791)--A Prosecutor's View of Pre-trial Restraints on the Press." DePaul Law Review, 26:417-46 (Spring, 1977).

Larue, L. H., "Politics and the Constitution." Yale Law Journal, 86:1011-14 (April, 1977).

"Lawyer Advertising Protected by the First Amendment." Creighton Law Review, 11:577-608 (December, 1977).

Le Clercq, F. S., "Disqualification of Clergy for Civil Office." Memphis State University Law Review, 7:555-614 (Summer, 1977).

Le Duc, Don R., "The Italian Broadcast-Cable Controversy and the European Courts. An Opening for Free Speech and Free Trade." Federal Communications Bar Journal, 29:1 (1976), 63-90.

Lee, W. E., "Supreme Court on Privacy and the Press." Georgia Law Review, 12:215-47 (Winter, 1978).

"Legal Issues in the Use of Guardianship Procedures to Remove Members of Cults." Arizona Law Review, 18:1095-139 (1976).

Lehman, M. P., "Constitutional Review: Supreme Court, 1976-1977 Term." Hastings Constitutional Law Quarterly, 5:61-419 (Winter, 1978).

LeMoult, J. E., "Deprogramming Members of Religious Sects." Fordham Law Review, 46:599-640 (March, 1978).

Letwin, L., "Administrative Censorship of the Independent Student Press--Demise of the Double Standard?" South Carolina Law Review, 28:565-85 (March, 1977).

Leventhal, H., "Courts and Political Thickets." Columbia Law Review, 77:345-87 (April, 1977).

Levine, C. D., "Should Civil Disobedience Be Legalized? Reflections on Coercive Protest and the Democratic Regime of Law." Southwestern Law Journal, 31:617-48 (Summer, 1977).

"Libel and Slander: The Constitution and the Private Figure in Oklahoma." Oklahoma Law Review, 30:686-99 (Summer, 1977).

"Limitations on Permissible State Aid to Church-Related Schools Under the Establishment Clause." Pepperdine Law Review, 5:573-88 (Spring, 1978).

Linde, H. A., "Fair Trials and Press Freedom--Two Rights Against the State." Willamette Law Journal, 13:211-21 (Spring, 1977).

Linsley, William A., "The Supreme Court and the First Amendment: 1976-1977." Free Speech Yearbook, 65-80 (1977). Falls Church, Virginia: Speech Communication Association.

Litwack, T. R., "Doctrine of Prior Restraint." Harvard Civil Rights Law Review, 12:519-58 (Summer, 1977).

Loevinger, L., "Is There Intelligent Life in Washington?" Federal Communications Bar Journal, 29:189-205 (1976).

Loewy, A. H., "A New Test for Obscenity." Trial, 14:31-7 (May, 1978).

Lucoff, Manny, "Telecommunications Management and Policy: Who Governs?" Journalism Monographs, Number Fifty-one (November, 1977), 1-37.

Marblestone, D. B., "Relationship Between the Government in the Sunshine Act and the Federal Advisory Committee Act." Federal Bar Journal, 36:65-85 (Winter-Spring, 1977).

Margolis, J., "Regulation of Advertising and Soliciting by the Legal Profession." University of British Columbia Law Review, 12:102-26 (1978).

Marks, S., "UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture, and Communication." Texas International Law Journal, 13:35-67 (Winter, 1977).

Martin, R., "Disclosure v. Privacy." Forum, 13:142-53 (Fall, 1977).

Martyn, S. R., "Lawyer Advertising: The Unique Relationship Between First Amendment and Antitrust Protections." Wayne Law Review, 23:167-99 (November, 1976).

Mayer, M. F. "New Approach to Obscenity--The Conspiracy Doctrine." St. Louis University Law Journal, 21:366-73 (1977).

McCarthy, J. T., "Cumpulsory Licensing of a Trademark: Remedy or Penalty?" Trademark Reporter, 67:197-254 (May-June, 1977).

McCollum, J. K. and J. F. Robinson, "Law and Current Status of Unions in the Military Establishment." The Los Angeles Bar Journal, 28:421-30 (July, 1977).

McGahey, R. L., Jr., "Comment on the First Amendment and the Scholar-Athlete." Human Rights, 6:155-67 (Winter, 1977).

"Mead Data Central, Inc. v. United States Department of the Air Force (566 F 2d 242): Extending the FOIA's Fifth Exemption." William and Mary Law Review, 19:343-59 (Winter, 1977).

"Media Liability for Libel of Newsworthy Persons: Before and After Time, Inc. v. Firestone (96 Sup Ct 958). Florida State University Law Review, 5:446-62 (Summer, 1977).

"Medical Care, Freedom of Religions, and Mitigation of Damages." Yale Law Journal, 87:1455-87 (June, 1978).

Meeske, Mike, "Minority Ownership of Broadcast Stations: The Diversification Policy." Free Speech Yearbook, 1977. Falls Church, Virginia: Speech Communication Association (1978), 81-86.

Meiklejohn, D., "Commercial Speech and the First Amendment." California Western Law Review, 13:439-55 (1977).

Meiklejohn, D., "Conscientious Objection in the Supreme Court: Welsh and Gillette." Cumberland Law Review, 8:1-19 (Spring, 1977).

Meiklejohn, D., "Public Speech in the Burger Court: The Influence of Mr. Justice Black." University of Toledo Law Review, 8:301-41 (Winter, 1977).

Meiklejohn, D., "Religion in the Burger Court: The Heritage of Mr. Justice Black." Indiana Law Review, 10:645-74 (1977).

Miller, F. H., "PSRO Data and Information: Disclosure to State Health Regulatory Agencies." Boston University Law Review, 57:245-88 (March, 1977).

"Moore v. City of East Cleveland, Ohio (97 Sup Ct 1932): The Emergence of the Right of Family Choice in Zoning." Pepperdine Law Review, 5:547-72 (Spring, 1978).

Muelder, G., "Protestants, Catholics and 'Free Exercise'" Cumberland Law Review, 8:77-104 (Spring, 1977).

Mummery, D. R., "Privilege of Freedom of Speech in Parliament." Law Quarterly Review, 94:276-90 (April, 1978).

"Native Americans and the Free Exercise Clause." Hastings Law Journal, 28:1509-36 (July, 1977).

"Neither the Special Characteristics of Broadcasting Nor the Probable Presence of Children in the Audience Justifies Overbroad and Vague Regulation of Indecent Language by the FCC." Georgia Law Review, 11:951-9 (Summer, 1977).

"New York Open Meetings Law: A Critical Evaluation." Albany Law Review, 41:329-62 (1977).

"News Media Cannot Broadcast Performance Without Consent." Mercer Law Review, 29:861-5 (Spring, 1978).

"Newsperson's Privilege in California: The Controversy and Resolution." Hastings Law Journal, 29:375-415 (November, 1977).

Nichols, John E., "The Tinker Case and Its Interpretation." Journalism Monographs, Number Fifty-two (December, 1977), 1-40.

Nicholson, M. A., "Buckley v. Valeo (96 Sup Ct 612): The Constitutionality of the Federal Election Campaign Act Amendments of 1974." Wisconsin Law Review, 1977:323-74 (1977).

"Ninth Circuit Holds Press Entitled to Greater Access to Prison Than Afforded General Public." Fordham Law Review, 45:1523-34 (May, 1977).

"Nominating Petition Requirements for Third-Party and Independent Candidate Ballot Access." Suffolk University Law Review, 11:974-1024 (Spring, 1977).

"Nonpartisan Freedom of Expression of Public Employees." Michigan Law Review, 76:365-404, (December, 1977).

"Nursing Home Access: Making the Patient Bill of Rights Work." University of Detroit Journal of Urban Law, 54:473-512 (Winter, 1977).

O'Brien, D. M., "Privacy and the Right of Access: Purposes and Paradoxes of Information Control." Administrative Law Review, 30:45-92 (Winter, 1978).

"Obscene and Indecent Language--Under the Communications Act's Censorship Provision, the FCC May Not Prohibit the Broadcasting of Nonobscene Speech Without Consideration of Context." George Washington Law Review, 46: 324-37 (January, 1978).

"Obscenity--New First Amendment Standards." Akron Law Review, 7:179-87 (Fall, 1973).

"Open America v. Watergate Special Prosecution Force (547F 2d 605): Judicial Revision of FOIA Time Limits." Northwestern University Law Review, 46:324-37 (January-February, 1977).

"Open Versus Closed Primaries: A Dilemma in the Illinois Election Process." Southern Illinois University Law Journal, 1977:210-34 (June, 1977).

"Pacifica Foundation v. FCC (566 F 2d 9): First Amendment Limitations on FCC Regulation of Offensive Broadcasts." North Carolina Law Review, 56:584-601 (April, 1978).

Pape, S.M., "Meetings and Correspondence, Including FOI Considerations." Food Drug Cosmetics Law Journal, 32:226-35 (May, 1977).

"People v. Religious Cults: Legal Guidelines for Criminal Activities, Tort Liability, and Parental Remedies." Suffolk University Law Review, 11: 1024-58 (Spring, 1977).

Pfeffer, L., "Workers' Sabbath: Religious Belief and Employment." Civil Liberties Review, 4:52-6 (November/December, 1977).

Polelle, M. J., "Unconstitutionality of the Qualified Truth Defense to Libel Actions." John Marshall Journal, 11:259-81 (Winter, 1977-1978).

"Political Boycott Activity and the First Amendment." Harvard Law Review, 91:659-91 (January, 1978).

"*Porno Non Est Pro Bono Publico*: Obscenity as a Public Nuisance in California." Hastings Constitutional Law Quarterly, 4:385-419, (Spring, 1977).

"Postal Obscenity Prosecutions After Miller v. California: Mandatory Venue in the Federal District of Intended Receipt." Boston University Law Review, 58:79-94 (January, 1978).

"Press and Juvenile Delinquency Hearings: A Contextual Analysis of the Unrefined First Amendment Right of Access." University of Pittsburgh Law Review, 39:121-35 (Fall, 1977).

"Press Protections for Broadcasters: The Radio Format Change Cases Revisited." New York University Law Review, 52:324-61 (May, 1977).

"Pretrial Remedies in Infringement Actions: The Copyright Holder's Impound of Flesh?" Santa Clara Law Review, 17:885-918 (Fall, 1977).

"Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution." Pepperdine Law Review, 5:809-46 (1978).

"Prior Restraints and Restrictions on Advertising After Virginia Pharmacy Board (Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. 96 Sup Ct 355): The Commercial Speech Doctrine Reformulated." Missouri Law Review, 43:64-89 (Winter, 1978).

"Prisoner Access to Psychosurgery: A Constitutional Perspective." Pacific Law Journal, 9:249-80 (January, 1978).

"Prisoners' Free Speech Rights: The Right to Receive Publications." Washington University Law Quarterly, 1977:649-85 (Fall, 1977).

"Privacy Act of 1974: An Overview and Critique." Washington University Law Quarterly, 1976:667-718 (Fall, 1976).

"Privacy, Appropriation, and the First Amendment: A Human Cannonball's Rather Rough Landing." Brigham Young University Law Review, 1977:579-611 (1977).

"Professional Advertising Ban Yields to Consumer Right to Know: Commercial Speech Granted First Amendment Protection." Seton Hall Law Review, 8:67-80 (1976).

"Professional Responsibility--Lawyer Advertising--Virginia State Bar Code Provision Prohibiting Publication of Non-free Information Concerning Attorneys and Their Practices Held Unconstitutional." Cumberland Law Review, 8:321-30 (Spring, 1977).

"Protection From Discovery of Researchers' Confidential Information." Connecticut Law Review, 9:326-35 (Winter, 1977).

"Protective Orders Against the Press and the Inherent Powers of the Courts." Yale Law Journal, 87:342-71 (December, 1977).

Provizer, N. W., "Of Lines and Men: The Supreme Court, Obscenity, and the Issue of Avertible Eye." Tulsa Law Journal, 13:52-81 (1977).

"Psychosurgery: The Rights of Patients." Loyola Law Review, 23:1007-28 (Fall, 1977).

"Public Figures, Private Figures, and Public Interest." Stanford Law Review, 30:157-89 (November, 1977).

"Public Inspection of State and Municipal Executive Documents: 'Everybody, Practically Everything, Anytime, Except.....'." Fordham Law Review, 45:1105-53 (April, 1977).

"Quadrennial Problem: Application of the Equal Opportunity and Fairness Doctrines to Political Campaigns." Detroit College of Law Review, 1976: 83-122 (1976).

Quint, P. E., "Toward First Amendment Limitations on the Introduction of Evidence: The Problem of United States v. Rosenberg." Yale Law Journal,86:1622-78 (July, 1977).

"Racial Discrimination in Private Schools, Section 1981, and the Free Exercise of Religion: The Sectarian Loophole of Runyon v. McCrary (96 Sup Ct 2586)." University of Colorado Review, 48:419-36 (Spring, 1977).

"Racial Exclusion by Religious Schools." Harvard Law Review, 91:879-86 (Fall, 1978).

"Regulation of Outdoor Advertising: Past, Present, and Future." Environmental Affairs, 6:179-200 (1977).

Reich, R. B., "Consumer Protection and the First Amendment a Dilemma for the FTC?" Minnesota Law Review, 61:705-41 (May, 1977).

"Release of Private Information Under Open Records Laws." Texas Law Review, 55:911-27 (May, 1977).

"Religious Rights of the Incarcerated." University of Pennsylvania Law Review, 125:812-75 (April, 1977).

Relyea, Harold C., "The Freedom of Information Act: Its Evolution and Operational Status." Journalism Quarterly, 54:3 (Autumn, 1977), 538-544.

"Reporter's Privilege and the First Amendment." Catholic Lawyer, 23:41-56 (Winter, 1977).

Reuben, D. H. and L. M. Ring, "Judges Have Rights, Too." Chicago Bar Record, 59:220-2+ (January-February, 1978).

"'Reversing' the Freedom of Information Act" Congressional Intention or Judicial Invention?" St. John's Law Review, 51:734-58 (Summer, 1977).

Riga, P. J., "Yoder and Free Exercise." Journal of Law and Education, 6:449-72 (October, 1977).

"Right of Access to Student Newspapers at Public Universities." The Journal of College and University Law, 4:209-22 (Spring, 1977).

"Right of Eccentricity." Hastings Law Journal, 29:519-44 (January, 1978).

"Right to Know and School Board Censorship of High School Book Acquisitions." Washington & Lee Law Review, 34:1115-31 (Fall, 1977).

"Right to Petition Rationale of Noerr-Pennington Doctrine Applied in Construction of Section 1985 (1) of Civil Rights Act." Washburn Law Journal, 17: 262-8 (Fall, 1977).

"Right of Public School Children to Receive Information." Wake Forest Law Review, 13:834-41 (Winter, 1977).

Rivera, Clark, "Ideals, Interests, and Civil Liberty: The Colonial Press and Freedom 1735-76." Journalism Quarterly, 55:1 (Spring, 1978), 47-53+.

Rogers, Raymond S., "'Congress Shall Make No Law...': A Computer-Assisted Content Analysis of Decisions of Justice William O. Douglas on the Issues of Obscenity and Pornography." Free Speech Yearbook, 1977. Falls Church, Virginia: Speech Communication Association, (1978), 91-102.

Rohde, S. F., "Real to Reel: The Hirsch (Silkwood v. Kerr-McGee Corp.; Kerr McGee Corp. v. Hirsch. 563 F 2d 433)." Pepperdine Law Review, 5:351-402 (Spring, 1978).

"Role of Civil Courts in Church Disputes." Wisconsin Law Review, 1977:904-27 (1977).

"Sale of Real Estate by Display of 'For Sale' Signs as Protected Commercial Speech." Boston College Law Review, 19:329-43 (January, 1978).

Schauer, F. F., "Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter." Virginia Law Review, 63:263-302 (March, 1978).

Schauer, F. F., "Reflections on 'Contemporary Community Standards': The Perpetuation of and Irrelevant Concept in the Law of Obscenity." North

Carolina Law Review, 56:1-28 (January, 1978).

Schauer, F. F., "Return of Variable Obscenity?" Hastings Law Journal, 28:1275-91 (July, 1977).

Schoeman, M. E., "Subscription Advisers, Blue Sky Registration, and the First Amendment." Business Lawyer, 33:249-62 (November, 1977).

"School Authorities May Prohibit High School Student's Distribution of Sex Questionnaire to Prevent Possible Psychological Harm to Other Students." Vanderbilt Law Review, 31:173-83 (January, 1978).

Scott, C. F., "Trial by TV: The Recasting of Estes." Illinois Bar Journal, 66:560-5 (June, 1978).

"Section 1981 and the Thirteenth Amendment After Runyon v. McCrary (96 Sup Ct 2586)--On the Doorsteps of Discriminatory Private Clubs." Stanford Law Review, 29:747-93 (April, 1977).

Seldman, J., "Discipline of Union Officers by Public Management." Arbitration Journal, 32:256-69 (December, 1977).

Sethi, S. P., "Case for (and against) the Imposition of Proof of Accuracy of Substantiation Requirements on Advocacy--Or Issue-Oriented Corporate Image--Advertising." Wayne Law Review, 23:1229-59 (July, 1977).

"Sex Discrimination in Private Clubs." Hastings Law Journal, 29:417-49 (November, 1977).

"Shaping the Contours of the Newsperson's Privilege." DePaul Law Review, 26:185-96 (Fall, 1976).

"Shopping Center Picketing: The Impact of Hudgens v. National Labor Relations Board (96 Sup Ct 1029)." George Washington Law Review, 45:812-38 (May, 1977).

Silver, I., "Libel, the 'Higher Truths' of Art, and the First Amendment." University of Pennsylvania Law Review, 126:1065-98 (May, 1977).

Simon, A. M., "Application of State Sunshine Laws to Institutions of Higher Education." Journal of College and University Law, 4:82-145 (Winter, 1976-1977).

Simmons, S. J., "Fairness Doctrine: The Early History." Federal Communications Bar Journal, 29:207-300 (1976).

Simmons, S. J., "FCC's Personal Attack and Political Editorial Rules Reconsidered." University of Pennsylvania Law Review, 125:990-1022 (May 1977).

Singletary, Michael, "Attitudes of Military Censors and Other Officers on Mass Media Issues." Journalism Quarterly, 54:4 (Winter, 1977), 727-732.

"Sixth Circuit Holds Removal of Books From Library Violates High School Students' Right to Know." Fordham Law Review, 45:1236-46 (April, 1977).

Smith, M. M., "'Violent Pornography' and the Women's Movement." Civil Liberties Review, 4:50-3 (January/February, 1978).

Spencer, D. R., "Establishment of Fault in Post-Gertz (Gertz v. Robert Welch, Inc. 94 Sup Ct 2997) Libel Cases." St. Louis University Law Journal, 21:374-84 (1977).

"State Aid to Nonpublic Sectarian Colleges." Tennessee Law Review, 44:377-88 (Winter, 1977).

"State College Press and the Public Forum Doctrine." University of Miami Law Review, 32:227-39 (December, 1977).

"State Prohibition of All Advertising by a Lawyer Is Unconstitutional." North Dakota Law Review, 54:253-60 (1977).

Staudohar, P. D., "Legal and Constitutional Issues Raised by Organizations of the Military." The Los Angeles Bar Law Journal, 28:182-6 (March, 1977).

Stein, B. A., "Advent of Advertising." Trial, 13:41-4 (September, 1977).

"Step Forward for the Consumer: A Constitutional Right to Know in Prescription Drug Price Advertising." Urban Law Annual, 13:179-91 (1977).

"Sunday Closing Laws in the United States: An Unconstitutional Anachronism." Suffolk University Law Review, 11:1089-115 (Spring, 1977).

"Supreme Court Holds Lawyers May Advertise." American Bar Association Journal, 63:1093-8 (August, 1977).

"Symbolic Speech and Compelled Expression: Wooley v. Maynard (97 Sup Ct 1428)." Utah Law Review, 1977:797-815 (1977).

"Taxation: Liberal Standard Proposed for Deducting Charitable Contributions to Religious Schools." Minnesota Law Review, 61:887-900 (May, 1977).

"Telecommunications: Greater Freedom for FCC Licenses in Choice of Program Content." University of Florida Law Review, 29:1011-19 (Fall, 1977).

"Tennessee Constitutional Provision Barring Ministers and Priests From Serving in the State Legislature Offends Neither the Free Exercise Clause Nor the Establishment Clause of the First Amendment." University of Cincinnati Law Review, 46:893-904 (1977).

"Title VII and the Sabbath Observer." Hofstra Law Review, 5:911-28 (Summer, 1977).

"Toward a Constitutional Definition of Religion." Harvard Law Review, 91: 1056-89 (March, 1978).

"Toward the Logical and Consistent Adjudication of Establishment Clause Cases." Western State University Law Review, 5:117-48 (Fall, 1977).

"Township Ordinance Prohibiting Advertisement of Residential Property Sales Through Use of On Premises 'For Sale' or 'Sold' Signs Violates Free Speech Clause of First Amendment." University of Cincinnati Law Review, 46:883-92 (1977).

"Traditional Ban on Advertising by Attorneys and the Expanding Scope of the First Amendment." Louisiana Law Review, 38:259-78 (Fall, 1977).

Trager, Robert and Harry W. Stonecipher, "Gag Orders: An Unresolved Dilemma." Journalism Quarterly, 55:2 (Summer, 1978), 231-240+.

"Trans World Airlines, Inc. v. Hardison (97 Sup Ct 2264): A Limitation of the Employer's Duty to Accomodate [sic] Religious Practices of His Employees." Utah Law Review, 1977:835-48, 1977.

"Unconstitutionality of Limitations on Contributiona to Political Committees in the 1976 Federal Election Campaign Act Amendments." Yale Law Journal, 86:953-73 (April, 1977).

"United States v. Kelner (534 F 2d 1021): Threats and the First Amendment." University of Pennsylvania Law Review, 125:919-46 (April, 1977).

"Valentino v. Gray (410 F Supp 1394): Incarceration and the Right to Free Enterprise." New England Journal of Prison Law, 3:549-87 (Spring, 1977).

Victorin, R. R., "Education and Promotion--Where Is the Line?" Food Drug Cosmetic Law Journal, 33:260-6 (June, 1978).

Vierira, E., Jr., "Exclusive Representation Versus Freedom of Petition for Nonunion Public Employees--A Study in Irreconcilable Constitutional Conflict." Detroit College of Law Review, 1977:499-611 (Fall, 1977).

"Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. (96 Sup Ct 1817): 'Freedom of Speech' for [Prescription] Advertising: Minimal Protection for the Consumer." Ohio Northern University Law Review, 4:459-69 (1977).

Wade, J. W., "Communicative Torts and the First Amendment." Mississippi Law Journal, 48:671-711 (Summer, 1977).

Walsh, John E., "Privacy vs. Crime Detection in England and the United States." Update, 2:2 (Spring, 1978), 20-22.

Ward, P. C., "Public's Access to Government--Freedom of Information, Privacy, and Sunshine Acts: An Address." Law Library Journal, 70:509-17 (November, 1977).

"Warner-Lambert Co. v. FTC. (562 F 2d 749): The Possibilities and Limitations of Corrective Advertising." New England Law Review, 13:348-68 (Fall, 1977).

"Warrant Protection for Incoming International Letters." Connecticut Law Review, 9:311-25 (Winter, 1977).

Wiley, Richard E., "Family Viewing: A Balancing of Interests." Journal of Communication, 27:2 (Spring, 1977), 188-192.

"Will the Victor Be Denied the Spoils? Constitutional Challenges to Patronage Dismissals." Hastings Constitutional Law Quarterly, 4:165-85 (Winter, 1977).

Williams, S. F., "Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation." Minnesota Law Review, 62:1-58 (November, 1977).

Wolinsky, S. M., "Seduction in Wonderland: The Need for a Seller's Fiduciary Duty Toward Children." Hastings Constitutional Law Quarterly, 4:249-77 (Spring, 1977).

Wright, J. S., "Politics and the Constitution: Is Money Speech?" Yale Law Journal, 85:1001-21 (July, 1976).

"Writers Guild v. FCC (423 F Supp 1064): Duty of the Networks to Resist Governmental Regulation." Syracuse Law Review, 28:583-607 (Spring, 1977).

Wanat, D. E., "Falsehoods, the Right of Privacy, and Constitutional Privilege: Time Inc. v. Hill, Revisited." Memphis State University Law Review, 8:33-61 (Fall, 1977).

Yasser, R., "Defamation as Constitutional Tort: With Actual Malice for All." Tulsa Law Journal, 12:601-26 (1977).

"Yes, FTC, There is a Virginia: The Impact of Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc. (96 Sup Ct 1817) on the Federal Trade Commission's Regulation of Misleading Advertising." Boston University Law Review, 57:833-63 (November, 1977).

Yoder, Jess, "Contributions of Sixteenth-Century Anabaptist Heretics to First Amendment Freedoms." Free Speech Yearbook, 1977. Falls Church, Virginia:

Speech Communication Association (1978), 24-34.

Young, D. J., "Constitutional Validity of State Aid to Pupils in Church-Related Schools--Internal Tension Between the Establishment and Free Exercise Clauses." Ohio State Law Journal, 38:783-805 (1977).

"Young v. American Mini Theatres, Inc. (96 Sup Ct 2440): Creating Levels of Protected Speech." Hastings Constitutional Law Quarterly, 4:321-59 (Spring, 1977).

"Young v. American Mini Theatres, Inc. (96 Sup Ct 2440): The War on Neighborhood Deterioration Leaves First Amendment Casualty." Environmental Affairs, 6:101-25 (1977).

"Zacchini v. Scripps-Howard Broadcasting Company (97 Sup Ct 2849): The 'Entire Act' Doctrine--Economic Recognition of Intangible Property." Capital University Law Review, 7:439-51 (1978).

"Zacchini v. Scripps-Howard Broadcasting Company (97 Sup Ct 2849): Media Appropriation, the First Amendment, and State Regulation." Utah Law Review, 1977:817-83 (1977).

Zill, D. M., "Free Speech and Military Command." Utah Law Review, 1977:423-56 (1977).

Books

Berns, Walter. The First Amendment and the Future of American Democracy. New York: Basic Books, 1976.

Busha, Charles H. An Intellectual Freedom Primer. Littleton, Colorado: Libraries Unlimited, 1977.

Fowler, Dorothy G. Unmailable: Congress and the Post Office. Athens, Georgia: University of Georgia Press, 1977.

Francois, William L. Mass Media Law and Regulation, second edition. Columbus, Ohio: Grid Publishing, Inc., 1978.

Glassman, Don. Writers' & Artists' Rights. Washington, D. C.: Writers Press, 1978.

Graebner, Norman A. ed. Freedom in America: A 200-Year Perspective. University Park, Pennsylvania: Pennsylvania State University Press, 1977.

Harris, Richard. Freedom Spent. Boston, Massachusetts: Little, Brown & Co., Inc., 1976.

Kahn, Frank J. Documents of American Broadcasting, third edition. Englewood Cliffs, New Jersey: Prentice Hall, 1978.

Krasnow, Erwin G. and Lawrence D. Longley. The Politics of Broadcast Regulation, second edition. New York: St. Martin's Press, 1978.

Kurland, Philip B., ed. Free Speech and Association: The Supreme Court and the First Amendment. Chicago, Illinois: University of Chicago Press, 1976.

Lindblom, Charles E. Politics and Markets. New York, New York: Basic Books, 1977.

Nelson, Harold L. and Dwight L. Teeter, Jr. Law of Mass Communications, third edition. Mineola, New York: Foundation Press, Inc., 1978.

Pfeffer, Leo. Religious Freedom. Skokie, Illinois: National Textbook Company, 1977.

Practicing Law Institute. Communications Law: 1978. New York, New York: PLI (810 Seventh Avenue, 10019), 1978.

Schauer, Frederick F. The Law of Obscenity. Washington, D. C.: Bureau of National Affairs, 1976.

Starr, Isidore. The Idea of Liberty. St. Paul, Minnesota: West Publishing Co., 1978.

Newsletters, Digests, and Reports

The following publications regularly carry news items and reports of developments in the field of free speech:

Broadcasting. Broadcasting-Telecasting Building, 1735 DeSales Street N.W., Washington, D.C. 20036: Broadcasting Publications, Inc.

Civil Liberties. 22 East 40th Street, New York, New York: The American Civil Liberties Union.

Editor & Publisher. 575 Lexington Avenue, New York, New York 10025: Editor & Publisher.

Free Speech. 5205 Leesburg Pike, Falls Church, Virginia 22041: Speech Communication Association.

FOI Digest. P. O. Box 858, Columbia, Missouri 65201: Freedom of Information Center.

Media Law Reporter. 1231 25th Street N.W., Washington, D.C. 20037: Bureau of National Affairs.

Newsletter on Intellectual Freedom. 50 East Huron Street, Chicago, Illinois 60611: Intellectual Freedom Committee, American Library Association.

Student Press Law Center Report. 1750 Pennsylvania Avenue N.W., Washington, D.C. 20006: The Student Press Law Center.

The News Media & the Law. 1750 Pennsylvania Avenue N.W., Room 1112, Washington, D.C. 20006: The Reporters Committee for Freedom of the Press.

The Quill. 35 East Wacker Drive, Chicago, Illinois 60601: The Society of Professional Journalists, Sigma Delta Chi.

Court Cases

F.C.C. v. National Citizens Committee for Broadcasting, 98 S. Ct. 2096, 56 L.Ed.2d 697 (1978). In view of the limited broadcast spectrum, allocation and regulation of broadcast frequencies is essential and nothing in the First Amendment prevents such allocation as will promote the "public interest" in the diversification of the mass-communications media, including requiring divestiture of existing combinations having an effective monopoly. 8-0 decision.

F.C.C. v. Pacifica Foundation, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). FCC order proscribing afternoon radio broadcast containing "indecent" language did not violate broadcaster's First Amendment rights or Section 326 of the Communications Act. 5-4 decision.

First National Bank of Boston v. Bellotti, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). The state could not prohibit the expenditure of corporate funds for the purpose of influencing votes since such a statute prohibited speech that the First Amendment was designed to protect. 5-4 decision.

Houchins v. KQED, Inc., 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978). The news media's right of access to the county jail is no greater under the Constitution than the public generally. 4-3 decision.

In re Primus, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978). Solicitation of prospective litigants on behalf of nonprofit organizations that engage in litigation as a form of political expression and association is protected by the First Amendment. 7-1 decision.

Landmark Communications, Inc., v. Virginia, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). The First Amendment does not permit criminal punishment of third persons who are strangers to the inquiry, including news media, for divulging or publishing truthful information regarding confidential proceedings of judicial review commission. 7-0 decision.

McDaniel v. Paty, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978). The Tennessee constitutional disqualification of ministers from membership in the Legislature, and thus from candidacy for delegate to the state constitutional convention, is unconstitutional, violating the minister's First Amendment right of free exercise of his religion. 8-0 decision.

National Broadcasting Co., Inc. v. Niemi, 98 S.Ct. 705, 54 L.Ed.2d 742 (1978). Suit seeking damages from TV network for alleged incitement to violence permitted to proceed; requiring network to defend the suit would not subject it to irreparable injury or violate the First Amendment. Rehnquist as Circuit Justice.

Nixon v. Warner Communications, Inc., 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). First Amendment generally grants the media no right to information about a trial superior to that of the general public; release of tape recordings used as evidence in a public trial is not mandatory upon the court. 5-4 decision.

Ohralik v. Ohio State Bar Association, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). Personal solicitation by an attorney for pecuniary gain is not protected by the First Amendment. 8-0 decision.

Pinkus v. United States, 98 S.Ct. 1808, 56 L.Ed.2d 293 (1978). In prosecution for mailing obscene materials, it was not proper for trial court to include children as part of "community" by whose standards obscenity was to be judged. 5-4 decision.

Procunier v. Navarette, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). State prison officials were held immune from liability for alleged negligent interference with prisoner's outgoing mail where there was not a First and Fourteenth Amendment right established at the time in question. 7-2 decision.

Zurcher v. Stanford Daily, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978). Warrant authorizing search of university student newspaper for photographs and negatives revealing identities of demonstrators who had assaulted police officers during confrontation at university hospital did not constitute a prohibited prior restraint. 5-3 decision.

Dissertations

This section of the bibliography is an expansion that should be of benefit to Yearbook subscribers. All early dissertations that seemed relevant have been included, but additional citations of works that have been missed will be welcomed for subsequent issues of the bibliography.

This section is in alphabetical order by author and includes the title of the dissertation, year of publication, reference to the location of the abstract in Dissertation Abstracts International (abbreviated here as DAI) with volume number and page location. If the dissertation is not available from Dissertation Abstracts International, the university granting the degree is cited.

Appreciation is extended to Professor Raymond S. Rodgers for his initial suggestion and considerable input.

Alfange, Dean, Jr. The Role of the Supreme Court in the Protection of Freedom of Expression in the United States. (DAI, 28:1-A, 265) 1967.

Anastaplo, George. Notes on the First Amendment to the Constitution of the United States of America. (University of Chicago) 1964.

Ashe, Margaret Ruth Berry. A Study of Change Measured Personality Adjustment and Release of Creativity Through Freedom of Expression in Writing. (DAI, 26:2, 860) 1964.

Baldwin, Robert Harrison. A Quest for Unity: An Analysis of the Educational Theories of Alexander Meiklejohn. (DAI, 28:12-A, 4942) 1967.

Banks, Dean. Creating an "American Dilemma": The Impact of Nazi Racism Upon American Intergroup Relations, 1933-1940, With Special Reference to Jewish-Americans, German-Americans, and the Free-Speech Movement. (DAI, 36:5-A, 3066) 1975.

Barbour, Alton Bradford. Free Speech Attitude Consistency. (DAI, 29:7-A, 2381). 1968.

Bayley, Richard Bennett. Freedom and Regulation of the Russian Periodical Press, 1905-1914. (DAI, 29:12-A, 4445) 1968.

Bennett, David Llewellyn. Freedom of Expression in Secondary Schools: A Study of Student Newspapers and Journalism Programs in Oklahoma High Schools and Their Relationship to Human Rights and Human Relations. (DAI, 37:1-A, 214) 1975.

Berk, Philip Edward. Canon 35: An Experimental Study of the Conflicts of Principles Between Fair Trial and Free Press. (DAI, 24:6, 2457) 1963.

Bernstein, Lottelore, C. M. Revolution and Response: Radical Thought in Vienna's Free Press, 1848. (Columbia University) 1972.

Black, Rutherford Ray. Implications of Supreme Court Interpretations of the First Amendment to the Constitution for the Teaching of Religion in State Universities and Land-Grant Colleges in the United States. (The University of Alabama) 1956.

Broadwater, Margaret Rogers. Labor and the First Amendment: Thornhill to Logan Valley Plaza. (DAI, 37:10-A, 6713) 1976.

Bunge, Walter Kenneth. Public Interest as a Function of the First Amendment in Broadcasting: A Study of the New Technology and Some Old Assumptions. (DAI, 33:5-A, 2405) 1972.

Burkholder, John Richard. Religion in the First Amendment: A Social Theory Approach to Constitutional Interpretation. (Harvard University) 1969.

Burnham, Jeffrey M. Freedom of Speech and the Public Interest in Broadcasting. (University of Chicago) 1971.

Cade, Dozier Copeland. A Critical Analysis of the Role of American Daily Newspapers in the Current Encroachment by Government and Society on Freedom of Expression in the United States. (DAI, 14:12, 2333) 1954.

Carroll, Thomas Fitzgerald. Freedom of Speech and the Press in the Critical Periods of American History. (The American University) 1923.

Carroll, William Alexander. The Natural Law and the Incorporation of the Provisions of the First Amendment Into the Due Process Clause of the Fourteenth Amendment. (Georgetown University) 1963.

Cazden, Robert Edgar. The Free German and Free Austrian Press and Booktrade in the United States 1933-1950 in the Context of German-American History. (University of Chicago) 1966.

Church, Thomas Watson, Jr. Conspiracy Law and Seditious Speech Offenses: Constitutional Ramifications of the Use of Criminal Conspiracy as a Device for the Regulation of Political Speech. (DAI, 34:5-A, 2712) 1973.

Collett, Patricia Ann. Value Dimensions of Free Speech Attitudes. (DAI, 33:10-A, 5865) 1972.

Cooper, Charles Jasper. Alexander Meiklejohn: Absolutes of Intelligence in Political and Constitutional Theory. (DAI, 29:5-A, 1576) 1967.

Davis, Norris Garland. Freedom of the Press in Texas: A Comparative Study of State Legal Controls on Mass News Media. (DAI, 14:8, 1211) 1954.

Del Guidice, Richard James. Justice Brennan and Freedom of Expression. (DAI, 36:6-A, 3976) 1975.

Doane, Robert Dale. The Consequentialist Defense of Freedom of Expression: A Critique. (DAI, 36:6-A, 3978) 1975.

Drinnon, James Earl, Jr. The Application of the First Amendment Right of Freedom of Expression to the Campus. (DAI, 32:8-A, 4372) 1971.

Dulaney, William Lee. An Assessment of Some Assertions Made Relative to the Fair Trial and Free Press Controversy. (DAI, 29:7-A, 2202) 1968.

Duniway, Clyde Augustus. Restrictions Upon the Freedom of the Press in Massachusetts. (Harvard University) 1954.

Ehling, William Philip. Contempt by Publication and Freedom of the Press: An Historical Analysis of the Theories and Practices of the Judicial Contempt Power. (DAI, 14:12, 2385) 1954.

Eimermann, Thomas Edward. Free Press--Fair Trial: An Empirical Look at the Problem and Its Solution. (DAI, 32:2-A, 1032) 1971.

Eshelman, David Lenhert. Compulsory Disclosure of News Sources: A Critical Investigation. (DAI, 34:7-A, 4460) 1973.

Ewelukwa, Dennis Ikwueme Ogunnwa. Freedom of Political Expression in the United States, India, and Nigeria. (Yale University) 1966.

Farmer, Richard Franklin. The Operational Relationship of the First Amendment Establishment and Free Exercise Clause to Public Education: An Analysis of Judicial Criteria Employed by Federal Courts. (DAI, 34:9-A, 5523) 1973.

Faulknek, Monica Irene. Student Responses to Campus Protests: A Study of the

Free Speech Movement at Berkeley. (DAI, 33:3-A, 1236) 1972.

Finnegan, Owen Edward. An Historical and Metaphysical Study of Natural Law Theory Applied to Questions of Freedom of Expression in the United States. (DAI, 38:11-A, 6378) 1965.

Fitzgerald, Thomas R. Limitations on Freedom of Speech in the Athenian Assembly. (University of Chicago) 1977.

Fleener-Marzec, Nickieann. D. W. Griffith's "The Birth of a Nation": Controversy, Suppression, and the First Amendment as it Applies to Filmic Expression, 1915-1973. (DAI, 38:11-A, 6378) 1977.

Fliess, Peter J. The Freedom of the Press Under the Law of the German Republic, 1918-1933. (Harvard University) 1951.

Fouts, Kenneth Burr. Eugene V. Debs: Champion of Free Speech. (DAI, 29:10-A, 3703) 1968.

Gambill, Joel Thirlo. Hugo Black: The First Amendment and the Mass Media. (DAI, 34:9-A, 5895) 1973.

Gardner, Mary Adelaide. The Inter-American Press Association and Its Fight for Freedom of the Press. (DAI, 22:11, 4001) 1960.

Geary, Thomas Alfred. A Critical Analysis of the FCC's Fairness Doctrine and the Proposed Right-of-Access as Alternative Means of Serving the First Amendment in Broadcasting. (DAI 36:11-A, 657) 1977.

Gibbs, Annette. Guidelines for the Chief Student Personnel Administrator in Implementing Editorial Policies Related to Freedom of Expression in Sanctioned Student Newspapers of State Colleges. (DAI, 31:9-A, 4429) 1970.

Gibson, Martin Leroy, Jr. Freedom of the Press: Foundations and Attitudes. (DAI, 35:1-A, 390) 1974.

Giel, Lawrence Alden. George R. Dale--Crusader for Free Speech and a Free Press. (DAI, 28:11-A, 4570) 1967.

Gillmor, Donald Myles. "Trial by Newspaper": The Constitutional Conflict Between Free Press and Fair Trial in English and American Law. (DAI, 22:11, 4001) 1961.

Goding, William Wimer. The Power and Hostility Dimensions of Free Speech Attitudes. (DAI, 30:12-A, 5523) 1969.

Graf, William Saunders. The Parameters of Free Expression in the Military. (DAI, 34:5-A, 2671) 1973.

Granato, Leonard Alan. Prior Restraint: Resurgent Enemy of Freedom of Expression. (DAI, 34:9-A, 5895) 1973.

Green, James Milburn. Alexander Meiklejohn--Innovator in Undergraduate Education. (DAI, 31:8-A, 3914) 1970.

Greenfield, Steven L. The Application of the First Amendment and the Fourteenth Amendment to the United States Constitution to the Legal Rights of Students. (DAI, 34:9-A, 5527) 1973.

Grenoble, Penelope B. The Los Angeles "Free Press." (DAI, 36:1-A, 13) 1974.

Gross, Franz B. Freedom of the Press Under Military Government in Western Germany, 1945-1949. (Harvard University) 1952.

Gross, Franz B. Freedom of the Press Under Military Government in Western Germany (1945-1949): The Origin and the Development of the New German Press. (DAI, 36:10-A, 6933) 1952.

Hall, William Edward, Jr. An Analysis of Post World War II Efforts to Expand Press Freedom Internationally. (DAI, 14:12, 2334) 1954.

Hartenberger, Werner Karl. Cameras in the Courtroom: The Role of the Broadcast Media in the Free Press--Fair Trial Controversy. (DAI, 30:1-A, 266) 1966.

Heckart, Ronald Jay. Justice Fortas and the First Amendment. (DAI, 34:4-A, 1983) 1973.

Heirich, Max Arthur. Demonstrations at Berkeley: Collective Behavior During the Free Speech Movement of 1964-1965. (DAI, 28:7-A, 2791) 1967.

Hossom, Harold Kenneth. Freedom of Speech and Public Opinion. (DAI, 12:1, 93) 1942.

Hudon, Edward Gerard. The Evolution of First Amendment Doctrines in the Supreme Court: An Historical Study of Cases on Freedom of Expression. (George Washington University) 1962.

Irwin, Mary Roberta. Republicanism and Freedom of Speech in Rome in the First Century. (Cornell University) 1945.

Jackson, Willie Sherman. Ohio and Amendment Thirteen: A State Biography of the First National Reform Amendment 1861-1865. (DAI, 30:10-A, 4511) 1969.

Johnson, Emory Montgomery. An Empirical Study of Relevant Personality Characteristics and Attitudinal Dimensions as Predictors of Free-Speech Attitudes. (DAI, 33:7-A, 3827) 1972.

Kimball, William Clayton. The Development of Doctrine: Free Speech, Harry Kalven, and Law-Review Advocacy. (Harvard University) 1975.

Kim, Holim. Free Press and Fair Trial: An Attitudinal Study of Lawyers and Journalists in a Conflict Between Two Professions. (DAI, 33:9-A, 5111) 1972.

Knight, Robert Patrick. The Concept of Freedom of the Press in the Americas: An Exploratory Study. (DAI, 29:3-A, 862) 1968.

Kraus, Richard James. Free Individual in a Free Society: The Philosophy of Justice William O. Douglas. (DAI, 32:4-A, 2135) 1971.

Levine, James Phillip. The Bookseller and the Law of Obscenity: Toward an Empirical Theory of Free Expression. (DAI, 29:7-A, 2323) 1968.

Lieberman, Jay B. Changing Concepts of Freedom of the Press. (Stanford University) 1953.

Linenthal, Eleanor Tabor, Freedom of Speech and the Power of Courts and Congress to Punish for Contempt. (DAI, 17:3, 666) 1956.

Lowenstein, Ralph Lynn. Measuring World Press Freedom as a Political Indicator. (DAI, 28:10-A, 4111) 1967.

Maclaughlin, Robert Kerwin. Freedom of Speech and the American Educational Television Station. (DAI, 30:6-A, 2653) 1969.

Magee, James Joseph. Mr. Justice Black and the First Amendment: The Development and Dilemmas of an Absolutist. (DAI, 36:7-A, 4735) 1975.

Marks, Thomas C., Jr. First Amendment Freedoms and the American Military. (DAI, 32:12-A, 7058) 1971.

Martin, Robert Atherton. Spontaneous Private Speech and the Mediation of Behavior in a Resistance-to-Temptation Paradigm. (DAI, 36:4-B, 1923) 1975.

Mauney, Connie Pat. Mr. Justice Black and First Amendment Freedoms: A Study in Constitutional Interpretation. (DAI, 36:8-A, 5516) 1975.

Mayes, Jerry Wilson. An Analytical Study of the Judicial Philosophy of Hugo Black as it Relates to Free Expression. (DAI, 34:4-A, 2060) 1973.

McDonald, Paul John. The Federal Constitution and Freedom of Expression for Students and Teachers: A Review of Court Decisions From 1965 Through 1972 With Implications for School Policies and Regulations in Massachusetts. (DAI, 34:6-A, 2977) 1972.

McDonough, Robert Eugene. American Orthodoxy and the First Amendment Freedoms: The Law and Public Dialogue of Early Virginia. (DAI, 31:9-A, 4858) 1970.

McGaffey, Ruth Michelsen. An Analysis of the Origin and Development of Selected Freedom of Speech Concepts. (DAI, 31:10-A, 5557) 1970.

McGrath, Hugh Peter. Cold War Liberalism and the Chilling Effect on Freedom of Expression. (University of Chicago) 1974.

Means, James Edward. An Empirical Study of the Relationship Between Anxiety-Proneness and Free Speech Attitudes. (DAI, 32:8-A, 4748) 1971.

Meeske, Milan Doyle. Broadcasting in the Public Interest: The Supreme Court and the First Amendment. (DAI, 29:12-A, 4513) 1968.

Middleton, Kent Richards. Commercial Speech and the First Amendment. (DAI, 39:1-A, 431) 1977.

Miles, George Thomas. Interpretation of Civil Liberty in Great Britain and the United States: A Comparative Analysis of Freedom of Speech and Public Security, Order and Decency. (DAI, 34:7-A, 4351) 1973.

Muchnik, Melvyn Mark. Free Expression and Political Broadcasting on Public Radio and Television. (DAI, 34:7-A, 4304) 1973.

Nage, Alex. Federal Censorship of Communist Political Propaganda and the First Amendment: 1941-1961. (DAI, 35:1-A, 490) 1973.

Nam, Sunwoo. A Comparative Study of Freedom of the Press in Korea, Taiwan, and the Philippines in the 1960s. (DAI, 31:3-A, 1303) 1969.

Nelson, Marlan D. Free Press-Fair Trial: The Effects of "Sensational" and "Non-Sensational" Pre-Trial News Stories and of a Judge's Admonition Upon "Juror" and "Non-Juror" Guilt Assessment. (DAI, 33:12-A, 6944) 1972.

Nelson, Robert J. Judicial Interpretation of Freedom of Press Since 1919. (Fordham University) 1959.

Nessel, William. First Amendment Freedoms, Papal Pronouncements, and Concordat Practice: A Comparative Study in American Law and Public Ecclesiastical Law. (Catholic University of America) 1961.

Nixon, Charles R. Free Speech for Anti-Democratic Groups. (Cornell University) 1948.

Norris, William Clyde, Jr. An Evaluation of Federal Court Decisions on Religion in Broadcasting in the Light of the First Amendment. (DAI, 32:12-A, 7023) 1971

O'Brien, F. William. Mr. Justice Reed and the Liberties of the First Amendment. (Georgetown University) 1956.

O'Donnell, Thomas F., Jr. Religion, Basic Education and the First Amendment: The Supreme Court From Fuller to Warren. (DAI, 34:4-A, 1669) 1973.

Pember, Don Raymond. Freedom and Privacy: The Law, the Media, and the First Amendment. (DAI, 31:2-A, 723) 1969.

Perchlik, Richard Adolph. Diversity of Knowledge in a Democracy and a Classification of the Freedoms of Expression and Knowledge Basic to Its Consideration in the Secondary School Social Studies Curriculum. (DAI, 25:10, 5644) 1964.

Perry, Eugene Harvey. Alexander Meiklejohn and the Organic Theory of Democracy. (DAI, 31:1-A, 442) 1969.

Pew, Mary Jean. An Analysis of Justice Robert H. Jackson's Interpretation of the Religious Clauses of the First Amendment. (DAI, 23:1, 243) 1961.

Pfaff, Daniel Wayne. The First Amendment and Symbolic Speech: Toward a Rationale of the Public Forum. (DAI, 33:4-A, 1671) 1965.

Politella, Dario. Patterns of Press Freedom in a Selected Group of Colleges and Universities in Indiana, 1964. (DAI, 26:3, 1628) 1965.

Pollock, Paul King. Judicial Libertarianism and Judicial Responsibilities: The Case of Justice William O. Douglas. (DAI, 29:11-A, 4073) 1968.

Ratliff, Roosevelt, Jr. Students in School and Court: An Examination of Students' Right to the Freedom of Expression in Public Schools, 1965-1975. (DAI, 38:12-A, 7264) 1978.

Riley, Samuel Gayle, III. The Free Press--Fair Trial Controversy: A Discussion of the Issues Involved and an Examination of Pretrial Publicity by Survey Research. (DAI, 31:11-A, 6002) 1970.

Robbins, Jan Clifton. Social Science Information and First Amendment Freedoms: An Aid to Supreme Court Decision-Making. (DAI, 31:10-A, 5441) 1970.

Robinson, Laura. Freedom of Speech in the Roman Republic. (Johns Hopkins University) 1938.

Rosenberg, Norman L. The Law of Libel and Freedom of Press: Criticism of Public Officials and Candidates, 1806-1917. (DAI, 32:12-A, 6904) 1972.

Rosengarten, Adolph George, Jr. Internal Tensions Generated by Conscription in an Externally Threatened Democracy. An Experiment Designed to Qualify and Quantify Some Elements in French Civil-Military Relations Before World War I by Analyzing Jury Trials Instituted Under the Legislation of 1881 Which Granted Freedom to the Press But Made Calumny of the Army and Public Subversions of Military Personnel Criminal Offenses. (DAI, 36:5-A, 3049) 1975.

Rothblatt, Morris. Mr. Justice Brennan and the First Amendment. (DAI, 28:8-A, 3239) 1967.

Rubin, David Mark. Reporting the Corporate State: Adversarity, Freedom of Information, Public Utilities, and the Press. (DAI, 33:9-A, 5112) 1972.

Shantz, Hermione. The Social and Educational Theory of Alexander Meiklejohn. (DAI, 30:4-A, 1473) 1969.

Shapiro, Martin Mathew. The Supreme Court and the First Amendment. (Harvard University) 1961.

Shoemaker, Thaddeus Eugene. Constitutional Conflict: Free Press--Fair Trial, A Problem in Democratic Theory. (DAI, 29:12-A, 4535) 1969.

Smith, Fred Leslie. The Selling of the First Amendment: An Analysis of Congressional Investigations of Four CBS Television Documentary Projects. (DAI, 33:6-A, 2964) 1972.

Snowiss, Sylvia. Justice Black and the First Amendment. (University of Chicago) 1968.

Speer, Diane Parkin. Freedom of Speech: Milton's View of Polemic and His Polemical Works. (DAI, 31:3-A, 1241) 1970.

Sponseller, Edwin H. Legal Aspects Concerning Teachers' First Amendment Rights of Freedom of Speech and Expression Within the Public School Classroom. (DAI, 37:1-A, 85) 1976.

Starkweather, John Amsden. Judgments of Content-Free Speech as Related to Some Aspects of Personality. (DAI, 15:10, 1907) 1955.

Steushoel, Myles Clayton. Religious Neutrality Under the Constitution: An Analysis of Alternative Rationales of the First Amendment Religion Clauses. (DAI, 26:12, 7428) 1965.

Stephenson, Jr., Donald Grier. Free Expression and the State Appellate Courts of Georgia and Florida: Constructive Contempt of Court, Written Obscenity, and the Public Forum. (DAI, 29:1-A, 303) 1967.

Stolper, Israel. First Amendment Freedoms--1812 to 1962--Applicable as a Restriction Upon the States by Way of the Fourteenth Amendment. (Harvard University) 1962.

Tanenhaus, Joseph. Organized Labor and Freedom of Speech: A Study of the Law Governing Picketing and Labor's Political Spending. (Cornell University) 1953.

Tenney, Craig Davidson. Major General A. E. Burnside and the First Amendment: A Case Study of Civil War Freedom of Expression. (DAI, 38:4-A, 2311) 1977.

Vanderpool, William S., Jr. The Rhetorical Principles Enuniciated in Supreme Court Decisions Affecting Free Speech. (Louisiana State University and Agricultural and Mechanical College, 1954.

Vogel, Joe Bill. Ethical Codes and Courts of Honor in the Press of the Free World. (DAI, 21:12, 3767) 1961.

Vortreflich, Charles Robert. Freedom of the Press in High School Newspapers: Federal Court Decisions and New York State Practices. (DAI, 34:11-A, 6928) 1974.

Walters, Kenneth Dale. Freedom of Speech in the Modern Corporation. (University of California, Berkeley) 1972.

West, Michael Anthony. The Constitutional Rights of College Students: The Principles of the First, Fourth, and Fourteenth Amendments as They Apply to Higher Education. (DAI, 37:4-A, 2023) 1976.

Wilson, Richard B. Freedom of Speech and Public Opinion. (University of California, Berkeley) 1952.

Yarbrough, Tinsley Eugene. Fair Trial Versus Free Press: Trial Publicity and Procedural Due Process. (DAI, 28:8-A, 3242) 1967.

COLLECTIONS ON RELIGIOUS FREEDOM: A RESEARCH REPORT

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Of all the First Amendment freedoms perhaps none is so volatile nor lends itself to fanaticism as does that of religious freedom. Dozens of "holy wars," scores of "reformations," and centuries of conflict have marked the concept so nobly defined. Charges and countercharges are flung as numerous groups defend their behavior on the ground of freedom of religion. The Mormons used it to defend polygamy, the Quakers to resist the draft, the Jehovah's Witnesses to refuse pledging the flag, and the Moonies to tempt a nation's youth. And the charges go on.

The scholars' task of bringing order and enlightenment to these areas and to the myriad avenues of other "religious freedom studies" is most often hampered by the lack of primary materials. This study was undertaken in a continuing effort[1] to assist the serious researcher in his quest to locate worthwhile collections of primary materials; in this case primary materials concerning religious freedom.

A survey of major bibliographic sources was conducted to discover which libraries and depositories might have a religious-freedom collection of significance. Each such unit was contacted to determine a variety of specifics about its collection. The results then were evaluated and divided into major and minor collections based on size, accessibility, arrangement, uniqueness and rarity of materials, and the current activity of the collection. The scope of the collection was not a factor in classification. In nearly all cases use of the collections was available only to the serious researcher. Pre-arrangements were advised.

Major Collections[2]

General

The Baskette Collection,[3] N. Frederick Nash, curator, Rare Book Room, University Library, University of Illinois, Urbana, IL 61801. Contains a multitude of books (including original editions), pamphlets, magazines, and vertical-file materials on a wide variety of religious-freedom topics. Most impressive is its court cases section.

The Labadie Collection,[4] Rare Book Room, University of Michigan, Ann Arbor, MI 48109. A large assortment of materials with a significant emphasis on current religious matters such as the Black Muslims and religious pacifism related to Vietnam.

The Morris Library, Southern Illinois University at Carbondale, Carbondale, IL 62901. Mostly concerned with vast specific collections. For instance, here are the archives of The Christian Century and the PAPERS of men such as Robert G. Ingersoll, Albert Theodore Schroeder, and Henry Nelson Wieman.

Atheism

American Association for the Advancement of Atheism, James Henry Johnson, director, P. O. Box 2832, San Diego, CA 92112. Undoubtedly the largest--and perhaps the best--library of atheist books in existence.

Anti-Semitism

The Anti-Defamation League, Research Archives, Jerome Bakst, director,

315 Lexington Avenue, New York, NY 10016. The Largest collection of anti-Semitism material in the world. However, few researchers are admitted to the materials room, although the staff will make some materials available to you. Attempts to remain current.

Mormonism

Historian's Office, Church Office Building, 50 East North Temple, Salt Lake City, UT 84150. Extensive library and archives are available to the serious scholar. The most-extensive collection of historical and current anti-Mormon materials in existence.

Quakerism

Friends Historical Library, Albert W. Fowler, assistant director, Swarthmore College, Swarthmore, PA 19081. 36,000 books and pamphlets, 725 periodical titles, 3,100 linear feet of vertical-file material, and over 2,000 reels of microfilm make this the most-impressive collection investigated. While obviously the largest amount of materials deal with the Quakers' struggle for religious freedom and tolerance, many items are available concerning pacifism, American peace movements, and conscientious objection and conscription.

Minor Collections

General

The Paula K. Lazrus Library, Edith G. Selig, supervisor, National Conference of Christians and Jews, 43 West 57th Street, New York, NY 10019. Early works on religious tolerance.

Americana

Boston Public Library, 666 Boylston Street, Box 286, Boston, MA 02117. Various early Americana collections such as sermons, religious debates, and the like.

Old Sturbridge Village Library, Old Sturbridge, MA 01566. 1790-1850 sermons, tracts, debates.

American Indians

American Philosophical Society Library, 105 South 5th Street, Philadelphia, PA 19106. Some religious items.

American Sunday School Union

Rare Book Room, Free Library of Philadelphia, Logan Square, Philadelphia, PA 19103. Large assortment of ASSU materials, including charges against other religious sects and groups.

Baptists

Brown University Library, 20 Prospect Street, Providence, RI 02912. Early materials, most impressive of which is Roger Willaims's unpublished diary.

Seventh-Day Movements

Seventh-Day Baptist Historical Society, 510 Watchung Avenue, P. O. Box 868, Plainfield, NJ 07061. Historical items of the trials and conflicts of nearly all American seventh-day movements from 1653 to the present.

Endnotes

[1]The first of this series was "The Baskette Collection: A Research Report," Free Speech Yearbook, VII (1976), 78-82, followed by "The Labadie Collection: A Research Report," Free Speech Yearbook, VIII (1977), 87-90.

[2]It should be remembered that these are collections of primary materials with a focus on some aspect of religious freedom, not merely general religious collections.

[3]For a more-detailed description of the Baskette collection see citation in endnote 1.

[4]For a more-detailed description of the Labadie collection see citation in endnote 1.

UNPROVABLE ASSUMPTIONS? THE REASONS AND EMPIRICAL EVIDENCE OF TWELVE WHO FAVOR CENSORSHIP

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In the spring of 1973 Raymond P. Gauer, national director of Citizens for Decent Literature (now called Citizens for Decency Under Law), wrote that he favored strengthened enforcement of obscenity legislation even though the "discussion of sex crimes or sex criminals in relation to obscenity is irrelevant. The law has never required proof of relationship between exposure and antisocial conduct--recognizing, of course, that such proof would be impossible to establish. . . ."[1] A few weeks later U. S. Supreme Court Chief Justice Warren Burger echoed Gauer's view that strict censorship should be continued in American society although "there is no conclusive proof of a connection between antisocial behavior and obscene material. . . . From the beginning of civilized societies," Burger added, "legislators and judges have acted on various unprovable assumptions (emphasis supplied)."[2]

Unprovable assumptions? Were there others relating to censorship? If so, what were they? If others existed, were they as "unprovable" as the one addressed by Gauer and Burger? In this study I attempt to find some answers.

Twelve advocates of censorship were selected. Ten are represented by essays from the anthologies edited by Cline, Hart, Hughes, and Rist. Kuh is represented by his book Foolish Figleaves? and Murphy by his book on Censorship.[3] All writings are contemporary, having been published between 1962 and 1975. (No essay or book was chosen on the basis of the reasons stated or the evidence cited; only two or three procensorship essays from the anthologies were omitted, and that because they were less well argued than the others. In short, an effort was made to include the best essays.) The writings of the twelve advocates were studied in order to determine (a) the reasons for favoring censorship, (b) the empirical evidence used in support of those reasons, (c) the stated definitions of "obscenity" and "pornography," and (d) views on whether or not government censorship should be continued. The results are summarized below and in the accompanying table.

Results

Reasons for Censorship

The twelve advocates state a total of six reasons in favor of censorship. The most-commonly stated reason is that of social-governmental harm, an argument included by nine of the writers: Berns, Christenson, Cline, Clor, Elliott, Keating, Kristol, Murphy, and Van den Haag. This argument, sometimes called a "defense of public morality," can be described as a "fall-of-Rome view." It is exemplified by Kristol, who states that obscenity "is inherently and purposefully subversive of civilization and its institutions." Without censorship, he argues, citizens will "capriciously" corrupt themselves, and society will end up being ruled by infantile, irrational, corrupt individuals. Typical variations are stated by Clor, who says that censorship is needed to preserve "responsible citizenship and decent social relations," and by Cline, who asserts that censorship is essential to the preservation of the family, love, self-discipline, and the social order.

The second most-commonly stated reason is that of harm to the individual, an argument included by six of the writers: Christenson, Fitch, Keating, Kristol, Kuh, and MacGregor. For example, Christenson reasons that the reading of "salacious literature encourages a morbid preoccupation with sex. . ., interferes with the development of a healthy attitude and respect

for the opposite sex," and leaves persons "psychologically scarred for life." Kuh states that some people, especially the young, will harm themselves by doing some of the things depicted by "obscenity." The other four express similar viewpoints.

The third most-commonly stated reason is that of aesthetic harm, a view held by four advocates: Berns, Elliott, Fitch, and Van den Haag. They argue that "obscene" trash drives out good art. As Berns says, censorship is needed to maintain the "distinction between Art and trash," thereby protecting art.

The fourth most-commonly stated reason is that of incitement to harm others--the very argument which CDL Director Gauer and Chief Justice Burger admit they cannot prove. Three of the writers list this reason. Kuh is representative of the group when he says that for some people pornography "will inflame drives that they may prove unable to handle," and some of these individuals will be stirred to commit crimes.

The fifth reason, argued by two advocates, is that obscenity is an invasion of privacy. Elliott states that pornography intrudes upon the privacy rights of citizens, and Kuh says that pornography "invades that precious privacy that, in our western culture, coexists with sexual intimacy." Just how one's privacy is invaded by an enclosed "adult" bookshop or theater or by a person quietly reading a "naughty book" is never made clear.

The final reason, argued only by Christenson, is that America must continue to censor to prevent the development of vigilante groups. "Middle America," he says, will not remain peaceful if the First Amendment is extended to pornography.

Use of Empirical Evidence

None of the twelve advocates makes use of empirical evidence to support the reasons he states. To put it another way, nine writers assert that our society and our government will collapse without censorship, but they state no evidence in support of this assertion. Six writers assert that reading and viewing sexual materials will harm the individual, but they state no evidence in support of this assertion. Four writers argue that "obscenity" destroys worthwhile art, but no evidence is given in support of this argument. The pattern is the same for the remaining three reasons.

Definitions of Obscenity and Pornography

The twelve procensorship writers deal with the matter of definition in three ways: by giving no definition, by giving a partial or indirect definition, and by attempting a full definition of terms. Berns, Keating, and Kuh fall in the no-definition group. Berns gives no reason for his omission, but Keating and Kuh do offer explanations. Keating believes that a definition is unnecessary because all "right-thinking" people know what is meant, whereas Kuh admits that the terms "obscenity" and "pornography" are imprecise and of little use in law enforcement. (Kuh's alternative is to draw up detailed operational definitions of language and depictions that will be prohibited and to suppress such materials in all cases without regard for any redeeming social value or artistic merit involved.)[4]

Cline, Fitch, and Kristol state "indirect" or "partial" definitions. Cline does not define, but in his conclusion he argues that when three out of four elements coalesce, the material should be censored. His four elements: (a) The material models antisocial behavior. (b) The sex is presented out of context (unrealistically or obsessively). (c) A shock or trauma is provided to the sensibilities of the average viewer. (d) The purpose or effect is to stimulate sexual lust.[5] Fitch includes in his essay a section entitled "What Is a Definition of Violence and of Pornography?" in which he defines neither "violence" nor "pornography." However, he does state that the "ends"

of literature and art determine whether or not the material is "pornographic." Kristol's partial definition is to explain one term by using the other. He states that "pornography differs from erotic art in that its whole purpose is to treat human beings obscenely [emphasis supplied], to deprive human beings of their specifically human dimension. That is what obscenity is all about."[6]

More-complete definitions are attempted by Christenson, Clor, Elliott, MacGregor, Murphy, and Van den Haag. Christenson says that the terms refer to "books, magazines, movies, plays, erotic displays, pictures, and records which vulgarize, desecrate, and cheapen sex, or which encourage or glamorize deviant sexual behavior."[7] Clor says that obscenity is "a continuum of prurient appeals, beginning with those that arouse 'lust' but do not portray violence, and concluding with those clearly recognizable as outright sadism. . . . [That] which portrays and, hence, stimulates some perverted, distorted, or ugly form of sexuality. . . [and] which degrades human beings by presenting them as mere objects of impersonal desire. . . ."[8] Elliott states that "pornography is the representation of directly or indirectly erotic acts with an intrusive vividness which offends decency without aesthetic justification."[9]

MacGregor argues that "acts are obscene precisely when they diminish the essential humanity of the human being, when they prostitute the individual. Thus, hardcore pornography is obscene because it reduces the person to nothing more than a set of genitals, but soft-core pornography is obscene [emphasis supplied] because it reduces the person to nothing more than a phony game player--a plastic mannequin, a shill or a con-man. The obscenity of soft-core pornography is the obscenity of machiavellianism."[10] According to Murphy "the peculiar feature or special characteristic of obscenity that distinguishes it from other sex publications is its lustful appeal. Sex to be obscene must be portrayed in a way calculated to be a certain solicitation or enticement, almost akin to a pandering, of the sexual emotions and passions of the reader."[11]

Van den Haag likes to define by threes. In "Quia Ineptum" he says that these three things are obscene: (1) arguments that favor heterodox attitudes about sex, (2) material that stimulates sexual experience or the desire for sex, and (3) material that stimulates interest in perverse forms of sexual satisfaction.[12] In "The Case for Pornography" he states that one can determine the matter by looking for three extrinsic qualities: (1) the intent of the creator (if to arouse lust the work is obscene), (2) the use made of the work (if stress is on prurience, it is obscene), and (3) the effect on the consumer (if it has a prurient-lewd effect, it is obscene).[13]

Obviously there is little agreement among the twelve on the matter of definition. One characteristic--"prurient appeal" (the arousal of sexual lust or desire)--is mentioned by four of the writers: Cline, Clor, Murphy, and Van den Haag. Otherwise the disparity ranges from Van den Haag's indictment of any argument that favors heterodox attitudes about sex and MacGregor's dislike for "soft-core pornography" (he names Playboy and Playgirl magazines as examples) to Christenson's "deviant sexual behavior."

Position on Government Censorship

Eleven advocates recommend the continuation of censorship by the government. The twelfth (MacGregor) does not state his opinion on this matter.

Summary and Conclusions

The twelve advocates state a total of six reasons in support of the proposition that "obscenity" and "pornography" should be censored: (1) social-governmental harm (nine advocates), (2) harm to the individual (six advocates), (3) aesthetic harm (four advocates), (4) incitement to harm others (three advocates), (5) invasion of privacy (two advocates), and (6) preventing vigilante censorship (one advocate). The most significant finding of this study is that none of the essayists attempts to use empirical evidence in direct support of a single argument--a finding that lends support to Chief Justice

Burger's admission of "unprovable assumptions." Furthermore, there is little agreement upon the meaning of the terms "obscenity" and "pornography." Despite the drought of evidence and the variation of definition all but one of the advocates urge that governmental censorship be continued.

The late Robert Hunt Lyman, former editor of the World Almanac, once said: "The surer I am of a 'fact,' the more pains I take to verify it."[14] One might paraphrase Lyman by admonishing the censors: "The surer you are of your reasons, the more pains you should take to support each one with empirical evidence." Perhaps the absence of scientific evidence, plus the lack of agreement upon definitions, explains why censorship is dying in the United States. In a free society a cause built on unprovable assumptions cannot be sustained forever, for "you cannot fool all the people all the time"--not even on the subject of sex.

Endnotes

[1]Letter to the Editor of Harper's, April, 1973, p. 20.

[2]Paris Adult Theatre I v. Slaton, 413 US 49 at 60 and 61 (1973).

[3]The advocates and their essays:

Walter Berns, "Democracy, Censorship, and the Arts"; in Victor B. Cline, ed., Where Do You Draw the Line? (Provo, Utah: Brigham Young University Press, 1974).

Reo M. Christenson, "Without Redeeming Social Value?" in Cline.

Victor B. Cline, "Pornography Effects: The State of the Art" and "The Pornography Commission: A Case Study of Scientists and Social Policy Decision Making"; in Cline.

Harry M. Clor, "Obscenity and Freedom of Expression"; in Cline.

George P. Elliott, "Against Pornography." In Douglas A. Hughes, ed., Perspectives on Pornography (New York: St. Martin's Press, 1970).

Robert E. Fitch, "The Impact of Violence and Pornography on the Arts and Morality"; in Cline.

Charles H. Keating, Jr., untitled essay in Harold H. Hart, ed., Censorship: For and Against (New York: Hart Publishing Company, 1971).

Irving Kristol, "The Case for Liberal Censorship"; in Cline.

Richard H. Kuh, Foolish Figleaves? Pornography In--And Out Of--Court (New York: Macmillan, 1967).

John MacGregor, "The Modern Machiavellians: The Pornography of Sexual Game-Playing"; in Ray C. Rist, ed., The Pornography Controversy (New Brunswick, NJ, 1975).

Terrence J. Murphy, Censorship: Government and Obscenity (Baltimore: Helicon Press, 1963).

Ernest Van den Haag, "Democracy and Pornography"; in Cline. "Quia Ineptum" (in John Chandos, ed., "To Deprave and Corrupt. . .": Original Studies in the Nature and Definition of "Obscenity" (New York: Association Press, 1962). "The Case for Pornography is the Case for Censorship and Vice Versa"; in Hughes.

[4]Kuh, pp. 291 ff.

[5]Cline, pp. 355-358.

[6]Cline, p. 47.

[7]Cline, p. 309.

[8]Cline, pp. 320-321.

[9]Hughes, p. 74.

[10]Rist, pp. 177-178.

[11]Murphy, p. 29.

[12]Chandos, p. 117.

[13]Hughes, pp. 126 ff.

[14]Saturday Review, October 23, 1948, p. 22.

Table:
OVERVIEW-SUMMARY

Censorship Advocates	Reasons for Censorship	Use of Empirical Evidence	"Obscn-Porn." Defined?	Continue Govt. Censorship?
1. Berns	a. Aesthetic b. Soc.-govt.	None	No	Yes
2. Christenson	a. Indiv. harm b. Soc.-govt. c. Prvnt./vigilantes	Indirect; none in direct support	Yes	Yes
3. Cline	a. Incitement b. Soc.-govt.	Indirect; admits no proof of cause-effect	Indirect	Yes
4. Clor	a. Soc.-govt.	None	Yes	Yes
5. Elliott	a. Privacy b. Aesthetic c. Soc.-govt.	None	Yes	Yes (especially for minors)
6. Fitch	a. Indiv. harm b. Aesthetic	None	Partial	Yes
7. Keating	a. Indiv. harm b. Soc.-govt.	None	No	Yes
8. Kristol	a. Indiv. harm b. Soc.-govt.	None	Partial	Yes
9. Kuh	a. Privacy b. Indiv. harm c. Incitement	None; admits no proof of cause-effect	No (by deliberate choice)	Yes
10. MacGregor	a. Indiv. harm	None	Yes	? (No position stated)
11. Murphy	a. Soc.-govt.	None	Yes	Yes
12. Van den Haag	a. Incitement b. Soc.-govt. c. Aesthetic	None	Yes	Yes

WESTMORELAND IN TALLAHASSEE

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Florida State University

In the course of the debate over President Carter's proposed treaties on the Panama Canal, General William Westmoreland made a quick tour of the Sunshine State under the sponsorship of Florida Citizens for Ratification of the Panama Canal Treaties. In his tour he came to the capital city of Tallahassee and spoke at the Florida State University at the invitation of Colonel Karl H. Borcheller, professor of military science and commander of the FSU Army-ROTC unit.

At eleven on the morning of Thursday, February 16, 1978, twenty minutes before Westmoreland's scheduled appearance, a picket line formed. Signs urged: "Get Westmoreland off FSU Campus" and "Stop U.S. Imperialism From Vietnam to Panama." Picketers raised the chant: "No war criminals at FSU!" And Jeff Rooney, of the Revolutionary Communist Youth Brigade, told a reporter: "We plan not to stop Westmoreland from speaking. We think he needs to be exposed for his crimes in Vietnam. We think he needs to be exposed for his right-wing line on the Panama Canal." Ironically, contrary to Rooney's apparent misinformation, Westmoreland came to speak for and not against the treaties.

The streets were wet from a morning rain, but only a drizzle bothered ROTC cadets as they gathered in green fatigues (Army) and blue dress uniforms (Air Force) outside the Chemistry Lecture Hall on the FSU campus. Down Call Street toward the auditorium came a small line of perhaps twenty-five protesters with banners saying "Westmoreland Off Campus" and 'Down With the Shah."[1]

First Catcalls, Then Ovation

Catcalls and boos greeted Westmoreland as he entered the auditorium. The cadets responded with a forty-second ovation. Colonel Borcheller introduced Westmoreland as "one of the great soldiers of our time." Shouts of the protestors responded: "He's a flunky." "He's a general of genocide." Cadets countered with another ovation. Protesters chanted: "Fight the rich, not their wars." One member of the audience said, "Let the war criminal speak." Another said that Westmoreland's address "is a big shame for the school. You're sitting here listening to this pig?"[2]

Westmoreland stood beside the rostrum as the catcalls continued, then spoke loudly over the confusion, "Will the leader of this group of kindergarten students please come forward?" Cadets applauded this sally; protesters redoubled their calls. The former Army Chief of Staff waited about two minutes, then turned to leave. "I'm not giving up, but you can't talk over this. This is impossible," he told a reporter as he left the auditorium.

Several students followed Westmoreland from the auditorium and, as he made his way to his car, apologized for the interruptions. Inside the hall angry protesters and cadets argued about the relative merits of the right of free speech versus that of protest.

Cathy Lambert, a fourth-year student and Air Force cadet, was visibly shaken: "This is terrible. People don't stand for anything any more.

In the parking lot Westmoreland spoke briefly to a group of retired war veterans, who said that they wanted to hear his views and regretted the incident. Hours later, at the Capital City Country Club, he addressed more than a hundred politicians and businessmen. Chesterton Smith, former president of the American Bar Association, introduced Westmoreland, who argued that rejection

of the treaties would encourage international terrorists to move into the Panama Canal area. Afterward he answered a dozen questions from skeptical members of his audience. Tallahassee policemen and Leon County deputy sheriffs stood by to prevent trouble, but none threatened.

Talking with reporters after the campus event, Westmoreland said: "I'm shocked. This is unprecedented. This has never happened to me before, even during the Vietnam War." In 1972 he had been warned that he would be shouted down if he tried to talk at Yale University. He avoided Yale but spoke in many other places. He found protesters elsewhere but none that refused to let him speak. "The last place in the world I thought this would happen would be in Florida."

Campus Reaction

Following the event letters to the editor of the Florida Flambeau[3] continued the controversy between supporters and critics of the protest. One called the protest "deplorable," adding: "A group of foreign agitators disrupted a lecture a great many students wanted very much to hear." Another student said he had skipped class to hear Westmoreland and blamed students of the Communist revolutionary brigade, adding, "I don't know if they organized it or just joined in on it." Another letter writer complained: "The Campus Commie Brigade said that their right to protest negated the majority's right to listen."

One student wrote: "When I went to hear Westmoreland, a group of individuals waving placards criticizing the general marched and babbled slogans referring to Westmoreland as 'a butcher'." They demanded that the general be banned from campus. After a while they paraded into the lecture hall and raised such a childish uproar that Westmoreland was unable to speak. After he had gone, these persons acted as though they had accomplished a wonderful feat. They did a remarkable thing all right. While they screamed 'butcher' at the top of their lungs they butchered the first amendment of the United States Constitution."

Dr. George Harper, a senior professor in the English Department, went to the lecture to hear Westmoreland because he needed help in forming his own judgment on the treaties: "Unfortunately I was denied this opportunity, as were approximately 200 other people in attendance. It seems a few people, approximately twenty to forty at most, were upset by the appearance of General Westmoreland at the FSU campus. . . .[Their disruptive comments included] 'Pig! Murderer! Baby-Killer!' and other intelligent comments like these. [The protesters] seemed to be predominantly comprised of foreign students from the Middle East (Iran) and of a few Communist Youth members." They exercised their right to protest, Harper concluded, and denied Westmoreland the right to speak.

On the other side one writer, self-identified as a former United States combat marine in Vietnam, wrote: "Today we stopped the war criminal Westmoreland cold in his tracks. I feel this is a victory for the American people and I salute the brave students of Florida State University for having the courage to expose the Hitler Westmoreland for the criminal and murderer that he really is."

Another participant in the demonstration, asking that his name be withheld, wrote:

> There is no way I was going to miss an opportunity to confront the man who commanded our atrocious and criminal Vietnam War effort.
>
> When I arrived at the Chemistry Building I was glad to see that some forty other students shared my feelings. After a spontaneous demonstration outside, we entered the lecture hall to await the general's arrival.
>
> It is difficult to describe the profound feelings of revulsion

and contempt I felt when the famous commander entered the hall and stood shaking hands not two feet from me. Literally quaking in my shoes, I struggled to contain ten years of sublimated hostility that was rapidly mobilizing in my veins. Before I could speak the man to my left lost control.

"Pig!" he shouted in Westmoreland's face.

"War criminal!" I added.

"Killer of women and children!" added another.

And that was the beginning. As Westy approached the podium murderous epithets resounded from every corner of the lecture hall. . . . Whenever silence seemed to have been achieved another scream would pierce the heavy atmosphere.

If we had it to do over again, I'm sure we would allow Westmoreland to speak. . .

I ask the community to excuse us a spontaneous and impulsive display of emotion towards a famous old villain.

Jeff Rooney, of the Revolutionary Communist Youth Brigade, claimed responsibility "as the initial organizers of the recent demonstration against retired General Westmoreland." To him and to his fellows of the RCYB "Westmoreland's presence was an ideological and political assault. He thought he could sneak onto a campus in northern Florida and just put out his sewage without receiving an unfavorable response."

The student newspaper (Flambeau, February 17) commented only once editorially under the title: "Of rights and apathy - Westmoreland":

Because former General William Westmoreland is objectively a war criminal, responsible for unspeakable atrocities against the Vietnamese, the individuals protesting his visit yesterday had, perhaps, a moral oblegation to do so. Certainly they had a constitutional right.

Totally preventing Westmoreland from speaking was, however, a mistake. . . .

The tactics that forced Westmoreland from the Auditorium were unfortunate. The depressing aspect of the demonstrators, however, was that fewer than half the protesters were Americans. The majority was composed of students from other nations.

The student senate passed a resolution about three weeks after the event. At their meeting on Wednesday, March 8, student senators voted to "condemn the behavior of those students who disrupted General William Westmoreland's speech." The resolution called on the senate to "endorse the efforts of the office of student affairs to reprimand those students" involved in the demonstration. The resolution included an apology to Westmoreland for the action of the disrupting students.

Borcheller's Opinion

Interviewed sometime after the event, Colonel Borcheller[4] said that when he invited Westmoreland to speak at FSU, he never dreamed that the retired general would be prevented from speaking. Borcheller was caught by surprise, though he knew, of course, that Westmoreland's role in Vietnam had made him a controversial figure. Our war in Vietnam had been increasingly unpopular and our withdrawal had apparently been supported by an overwhelming majority of the American people. Westmoreland had been closely identified with that war.

Even so, Colonel Borcheller hoped that an exchange of ideas suitable for a university campus might result. He anticipated the probability that some students in the audience--perhaps even some of the ROTC cadets--might raise questions about our involvement in Vietnam and bring about a useful and educational dialogue.

Borcheller blames the incident on professional dissidents and revolutionaries. On the FSU campus an alliance had been formed between the tiny Revolutionary Communist Youth Brigade and the larger group of Iranian students at Florida State and Florida A. & M. universities. The two groups had supported each other's demonstrations in the past, and this was a natural opportunity for protest and publicity. No warning, however, ever reached Borcheller or any other authority that this might develop into a full-scale refusal to permit Westmoreland to speak. Westmoreland might have waited a little longer before walking out, but generals are not accustomed to standing around. Borcheller can understand the general's frustration. After waiting several minutes for order to be restored, Westmoreland commented to Borcheller: "There's no sense to this. Let's go."

Official University Reaction

The university's official reaction proved frustrating to the student-affairs officer at the time: Dr. Lou Goldhagen.[5] President Bernard Sliger was quoted in the Tallahassee Democrat (February 17) as critical of the demonstrators: "This disturbs me. We will try to find out their identities and take action against them."

In common with other universities FSU, during the Vietnam War, had lived through its share of disruptive demonstrations and threats. On one occasion, years earlier, a sheriff's posse had appeared on campus, fully armed with bayonet-tipped rifles. On another the same group had been mobilized to act against black students occupying the president's office, but blacks left before the posse moved. But these events occurred years ago, and no one thought to warn ROTC commanders of possible difficulties. Nor had Colonel Borcheller anticipated serious problems.

Actually, as Dr. Goldhagen pointed out, Westmoreland walked out one aisle as campus security officers walked in the other. Standard operating procedures in case of disruptive demonstrations call for security officers to give disrupting students two minutes' warning to cease and desist their disruption or be subject to arrest. In this case the officers did not themselves witness the disruption themselves, so standard procedures proved impossible.

Identifying participants in disruption was not easy. At the time Goldhagen had only a graduate student as a half-time judicial officer. Three of the disruptive students were positively identified within a week: a leader of the Revolutionary Communist Youth Brigade, a disabled Vietnam War veteran with a history of psychiatric problems, and a leader of the campus "free university": the Center for Participant Education. Letters were sent to each of them, requiring them to appear before the judicial officer. They came in together with eight more students who appeared to be from the Revolutionary Communist Youth Brigade. Two other students were later accused of disrupting the peace of the campus.

University regulations gave them a choice of forums in which to be heard: a university administrative hearing, a hearing before a conduct committee made up of faculty and students, or appearance before the student supreme court. They chose the last. Unfortunately court procedures violated privacy laws. Despite urging by the student-affairs officer the court had never brought its procedures into accord with the law.

The winter quarter evaporated. The RCYB leader left the university, the Vietnam veteran flunked out, and only the CPE leader remained on campus. An official stop was placed on the records of the first two in case either should again seek to register at the university.

During the period of investigation the university was searching for a new vice-president for student affairs. A new man from Southern Methodist University came aboard: Dr. Bob Leach. The student supreme court said that too much time had elapsed between the event and a hearing on the charges against the students. The student-body president advised against further proceedings. The new vice-president for student affairs told the judicial officer to drop the charges. Those who disrupted General Westmoreland's attempted speech on the Florida State University campus were never punished or officially reprimanded.

Endnotes

[1]At the time I was teaching a two-hour class in the next building and on my break saw the cadets assemble. My daughter, a student at the university's Development Research School, got excused from her classes to hear Westmoreland.

[2]This description is a composite of the accounts in the Tallahassee Democrat and the Florida Flambeau (student newspaper) for Friday, February 17, 1978.

[3]These continued to appear sporadically in the daily campus newspaper for a month after the event.

[4]Colonel Borcheller has retired from his military duties and is now living in Tallahassee. He was interviewed by telephone in September.

[5] Dr. Goldhagen is at this writing a special assistant to President Sliger. She was interviewed by telephone in October.